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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Ms. J.P., et al.,

Plaintiffs,

vs.

WILLIAM P. BARR, et al..

Defendants.

Case No. 2:18-CV-06081-JAK-SK

**JOINT STIPULATION PURSUANT
TO C.D. CAL. LOCAL RULE 37-2**

Assigned to: Hon. John A. Kronstadt
and the Hon. Steve Kim

Date: February 5, 2020
Time: 10:00 a.m.
Place: Roybal Federal Building and
United States Courthouse
255 E. Temple Street
Courtroom 540
Los Angeles, CA 90012
Action Filed: July 12, 2018
Discovery Cutoff Date: October 5, 2020
Pretrial Conference: TBA
Trial Date: April 20, 2021

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1 **JOINT STIPULATION OF PLAINTIFFS AND DEFENDANTS**
2 **PURSUANT TO LOCAL RULE 37-2**

3 Pursuant to Federal Rule of Civil Procedure 37 and Local Rule 37, Plaintiffs
4 Ms. J.P., Ms. J.O., and Ms. R.M., on behalf of themselves and all others similarly
5 situated (“Plaintiffs”), as movants, and Defendants William P. Barr, Kevin K.
6 McAleenan,¹ the Department of Homeland Security, United States Immigration and
7 Customs Enforcement, United States Customs and Border Protection, Alex M. Azar
8 II, the Department of Health and Human Services, Jonathan H. Hayes, Office of
9 Refugee Resettlement, David Marin, Lisa Von Nordheim, Marc Moore, and Lowell
10 Clark (collectively “Defendants”) submit this Joint Stipulation regarding Plaintiffs’
11 motion to compel full and complete production of documents by Defendants to
12 Plaintiffs’ First Set of Request for Production of Documents to Defendants
13 propounded by Plaintiffs on January 10, 2019.

14 Filed concurrently herewith is the Declaration of Kevin M. Fee attaching the
15 scheduling order in this matter, pursuant to Local Rule 37-1 (Exhibit A), Plaintiffs’
16 Requests for Production (Exhibit C), Defendants’ Supplemental Responses to
17 Plaintiffs’ Requests for Production (Exhibits D, E, F), and additional relevant filings
18 and correspondence regarding the discovery at issue. The parties met and conferred
19 three times telephonically, due to Defendants’ counsel being in Washington D.C., in
20 good faith on December 6, 2019, December 10, 2019, and December 20, 2019 but
21 while able to resolve certain issues were unable to resolve the dispute.

22 Pursuant to this Court’s request on Judge Kim’s website, “disputed discovery
23 requests involving the same issue(s) should be logically grouped” and that is done
24 below here. First, Plaintiffs state that as all three Defendants are represented by the
25 same counsel and provided similar responses to discovery, all are handled here

26
27 ¹ Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Acting Secretary of
28 Homeland Security Chad F. Wolf is substituted for the former Acting Secretary Kevin
K. McAleenan.

1 together. Second, after the parties' introductory statements under Local Rule 37-2.1 in
2 Section I, the discovery requests and Defendants' responses are laid out in Section II
3 and then Plaintiffs' and Defendants' arguments are logically grouped by topic in
4 Section III.

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1 TABLE OF CONTENTS

	Page	
I.	INTRODUCTORY STATEMENTS	1
A.	Plaintiffs' Introductory Statement.....	1
B.	Defendants' Introductory Statement	4
II.	THE DISPUTED DISCOVERY AND DEFENDANTS' RESPONSES	7
III.	ARGUMENTS ON DISCOVERYError! Bookmark not defined.	
A.	List of Putative Class Members (RFP 1)	51
1.	Plaintiffs' Argument	51
2.	Defendants' Argument.....	51
B.	Documents Relating to the Zero Tolerance Separation Policy (RFPs 2, 3, 4, 5, 6, 7, 8, 9, and 16).....	53
1.	Plaintiffs' Argument	53
2.	Defendants' Argument.....	57
C.	Discovery into Defendants' Claims of Necessity and Prior Programs (RFPs 6, 7, 9, 10, 11)	62
1.	Plaintiffs' Argument	62
2.	Defendants' Argument.....	63
D.	Time Period for Discovery.....	66
1.	Plaintiffs' Argument	66
2.	Defendants' Argument.....	67
E.	Documents Produced in Other Litigation (RFP 16)	68
1.	Plaintiffs' Argument	68
2.	Defendants' Argument.....	69
F.	Objections Based on Existence of Zero Tolerance Separation Policy (RFPs 2, 3, 4, 8, 9, 16)	71
1.	Plaintiffs' Argument	71
2.	Defendants' Argument.....	72
G.	Production of Health Information (RFPs 12, 13, 14)	74

1	1.	Plaintiffs' Argument	74
2	2.	Defendants' Argument.....	75
3	H.	Production of Information Related to Inmate Health Message Slip (RFP No. 15)	80
4	1.	Plaintiffs' Argument	80
5	2.	Defendants' Argument.....	80
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
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1 **I. INTRODUCTORY STATEMENTS**

2 **A. Plaintiffs' Introductory Statement**

3 Plaintiffs represent a class of refugees, who crossed the border with their
4 children seeking asylum and who were separated from their children by Defendants,
5 causing severe trauma in violation of Plaintiffs' constitutional rights. The Court in this
6 case has certified a class of Plaintiffs, issued a Preliminary Injunction finding
7 Plaintiffs were likely to succeed in proving a constitutional violation and ordering the
8 Government to provide appropriate mental health treatment to Plaintiffs due to the
9 urgency of the trauma, and denied Defendants' motion to dismiss.²

10 Over a year ago on January 10, 2019, Plaintiffs served Defendants with
11 Requests for Production containing sixteen limited requests, targeted directly to the
12 key points in Plaintiffs' Complaint³ and this litigation. Declaration of Kevin M. Fee in
13 Support of Plaintiffs' Motion to Compel ("Fee Decl.") Ex. C (Plaintiffs' First Set of
14 Requests for Production of Documents). Defendants responded to these requests with
15 repetitive, boilerplate objections. Fee Decl. Exs. D, E, F (Defendants' Supplemental
16 Responses to Plaintiffs' Requests for Production).

17 Such objections – while improper – are all too common in litigation, but they
18 are rarely made, as here, in the face of an Order by the District Court specifically
19 citing the information Defendants have objected to providing as necessary to its
20 analysis of Plaintiffs' claims in the course of issuing a Preliminary Injunction. Despite
21 this, the DOJ Defendants have not agreed to produce *a single document* in response to
22 Plaintiffs requests for production. DHS Defendants have not agreed to produce any
23 documents for 11 requests and have severely limited their responses to the remaining
24 5. HHS Defendants have not agreed to provide any documents for 9 requests and have

25

² "Order re Plaintiffs' Motion for Class Certification (Dkt. 81); Plaintiffs' Motion for
26 Preliminary Injunction (Dkt. 45); Defendants' Motion to Dismiss (Dkt. 132)" at ECF
27 Dkt. No. 251 is referred to herein as the "Order." Pursuant to Local Rule 37, the Order
28 is attached as Exhibit G to the Fee Declaration.

³ The Complaint is ECF Dkt. No. 1 and is attached as Exhibit H to the Fee
Declaration.

1 severely limited their responses to the remaining 7.

2 Since the collapse of settlement negotiations, Defendants have twice moved *ex*
3 *parte* to delay discovery (once seeking the delay of just discovery and once seeking to
4 stay the case). ECF Dkt. Nos. 238, 262. Both applications were denied by the Court.
5 ECF Dkt. Nos. 253, 267. As part of negotiations on this motion, Defendants have
6 informed Plaintiffs that they could not meet and confer within the deadlines required
7 by Local Rule 37, and they have repeatedly missed their promised deadlines to
8 provide comments, revisions, and other responses. Fee Decl. Exs. I, J, K
9 (correspondence with Defendants' counsel).

10 Given the importance of the disputed discovery to the relief required by the
11 Court's Preliminary Injunction and Plaintiffs' preparation for depositions and trial,
12 Plaintiffs believe the Court's intervention is necessary to resolve these disputes. As
13 the Court found, it is critical to get members of the Plaintiffs' class timely access to
14 mental health care. Order at 41-42. A year has passed already. Further delay and
15 obstruction by Defendants is unacceptable.

16 The information Plaintiffs seek is narrowly-tailored, based precisely on claims
17 in Plaintiffs' Complaint, and directly relevant to what Plaintiffs' will need to prove at
18 trial. The Court has already found the issues in this case sufficiently pressing – and the
19 balance of harms and the public interest tipping in Plaintiffs' favor – to issue a
20 Preliminary Injunction. *See* Order at 41-42. Defendants have access to the requested
21 documents; Plaintiffs do not. Given the narrowness and relevance of the information
22 sought, and the extreme situation Plaintiffs find themselves in, the information is
23 clearly within the scope of discovery under the Federal Rules and not unduly
24 burdensome. Fed. R. Civ. P. 26(b)(1).

25 Defendants' two main relevance objections are as follows: 1) Defendants argue
26 that any discovery into the Zero Tolerance Separation Policy, how it was
27 implemented, and how it was devised are irrelevant to this case; 2) Defendants argue
28 that discovery into statements by Government officials about necessity and the Family

1 Case Management Program are irrelevant to this case.

2 Plaintiffs' Complaint centers on the Zero Tolerance Separation Policy and its
3 effects on Plaintiffs. *See* Complaint ¶¶ 74-104, First and Second Claim for Relief. To
4 succeed on their claims, Plaintiffs must prove that the "family separation policy, in
5 combination with the insufficient mental healthcare provided during detention
6 violated their due process rights." Order at 47. In addition, to prove a state-created
7 danger created by the policy and failure to provide adequate mental healthcare,
8 Plaintiffs must show that Defendants were aware of the danger. *Id.* at 41 (finding that
9 Plaintiffs had presented evidence on this). In addition, Plaintiffs must counter
10 Defendants' necessity defenses, and discovery into the Family Case Management
11 Program and statements by officials goes directly to these claims. Complaint ¶ 7, 75-
12 77; *See* Order at 20, 36. As the Court recognized, Plaintiffs must prove *both* the
13 unconstitutional harm caused by Defendants' Zero Tolerance Family Separation
14 Policy *and* the inadequate mental healthcare provided. Order at 47. Defendants cannot
15 refuse to provide discovery on the policy, its implementation, statements around it,
16 and alternatives that were rejected, all of which are relevant to Plaintiffs' arguments.

17 Defendants' argument that the Zero Tolerance Separation Policy is the subject
18 of the *Ms. L.* case is unavailing. While correct that *Ms. L.* found Defendants' policy
19 unconstitutional, that does not make discovery irrelevant here. Plaintiffs must prove
20 that Defendants' unconstitutional policy caused the mental health trauma Plaintiffs
21 complain of, that Defendants' disregarded the harm that would be caused by their
22 policy, and that Defendants did not provide the necessary care to Plaintiffs to address
23 the trauma they caused. The Court recognized that there is a relationship between the
24 constitutional rights asserted by the class here and the class in the *Ms. L.* case. Order
25 at 14. While the claims and relief are different, Plaintiffs here must still prove their
26 case which involves proving *inter alia* the unconstitutional harm caused by the family
27 separation policy and the mental health trauma it inflicted.

1 **B. Defendants' Introductory Statement**

2 Plaintiffs' Motion to Compel Defendants to produce certain documents in
3 response to their First Set of Requests for Production should be denied. Plaintiffs
4 move to compel on the following eight grounds: 1) that Defendants should produce
5 the class list from *Ms. L.* prior to the entry of a protective order in this case; 2)
6 documents relating to the Zero Tolerance Policy are relevant to the claims and
7 defenses in this case; 3) discovery into Defendants' alleged claims of necessity and
8 Defendants' prior programs is relevant; 4) the time period for discovery should extend
9 back to January 20, 2017; 5) documents produced in other litigation involving the
10 Zero Tolerance Policy are relevant; 6) Defendants' objections to the existence of the
11 Zero Tolerance Policy lack credibility; 7) Defendants should complete production of
12 responsive medical records within four months; and 8) production of information
13 relevant to the Inmate Health Message Slip is relevant. For the reasons outlined
14 below, Plaintiffs' arguments lack merit.

15 First, as an initial matter, Plaintiffs' claim that Defendants have been dilatory
16 fundamentally mischaracterizes the good-faith meet and confer process. Plaintiffs
17 served Defendants with Requests for Production ("RFP") on January 10, 2019, while
18 decisions on Plaintiffs' Motions for Preliminary Injunction and Class Certification and
19 Defendants' Motion to Dismiss were pending. *See* Fee Decl. Ex. C. Shortly thereafter,
20 this case was referred for settlement discussions. For several months, the parties
21 engaged in settlement negotiations, but the matter was not resolved through the
22 settlement process and was returned to the Court's active docket on October 17, 2019.
23 Order at 2. Defendants responded to Plaintiffs' RFPs less than a month later on
24 November 12, 2019, and thereafter supplemented their responses to the RFPs on
25 December 17, 2019. *See* Fee Decl. Exs. D, E, F.

26 Since this case returned to the Court's active docket, Defendants have
27 continued to work diligently with Plaintiffs to resolve issues concerning a protective
28

1 order and the instant motion to compel.⁴ See Declaration of Lindsay M. Vick in
2 Support of Defendants' Opposition to Plaintiffs' Motion to Compel ("Vick Decl.")
3 Exs. 1, 2, 3 (correspondence with Plaintiffs' counsel). As noted, Defendants have also
4 met and conferred with Plaintiffs, in good faith, on three occasions concerning their
5 First Set of Requests for Production. Plaintiffs cite no support for their allegation that
6 Defendants have been dilatory or "slow-playing" in response to the discovery disputes
7 in this case. Their mischaracterization of Defendants' good faith efforts to actively
8 engage with Plaintiffs and resolve disputes is incorrect and unnecessary.

9 Second, Plaintiffs repeatedly refer to the government's "Zero Tolerance
10 **Separation** Policy," and this characterization is incorrect. There is no such thing as a
11 "Zero Tolerance **Separation** Policy." As noted below, the Zero Tolerance Policy was
12 announced in a memorandum from the former Attorney General in April 2018. The
13 Policy provided for the prosecution under the illegal-entry statutes of all adults who
14 crossed the border between ports of entry, regardless of whether that adult is a
15 member of a family unit. An effect of the application of the Policy led to an increase
16 in separations of alien families because a parent who is referred for prosecution
17 becomes unavailable to care for her child, and the child therefore becomes an
18 unaccompanied alien child who must, by law, be transferred to the custody of Health
19 and Human Service's ("HHS's") Office of Refugee Resettlement ("ORR").

20 Consistent with the memorandum, DHS referred for prosecution to DOJ adult
21 aliens—including those traveling with children—who unlawfully entered the United
22 States on the Southwest border in violation of § 1325 or other criminal immigration
23 statutory provisions. Such alien adults were referred to U.S. Marshals Service for
24 prosecution. Their alien minor children, rendered unaccompanied due to their parents
25 being amenable to prosecution, were transferred to ORR consistent with 6 U.S.C.

26 ⁴ Following the January 13, 2020 status conference, the district court ordered that, "on
27 or before 1/31/2020, counsel meet and confer as to any outstanding issues on a
28 protective order and then file a joint submission that includes the parties' respective
and/or collective positions." Vick Decl. Ex. 9 (Court's Status Conference Order, dated
January 14, 2020, ECF No. 272).

1 § 279(g) and 8 U.S.C. § 1232(b). As a result, parents were frequently detained in
2 Immigration and Customs Enforcement (“ICE”) custody separate from their children,
3 who remained in HHS’s custody, for appreciable periods of time. All of the Named
4 Plaintiffs in this case entered the United States unlawfully and were referred for
5 prosecution. Defendants accurately defined the Zero Tolerance Policy throughout their
6 responses to Plaintiffs’ RFPs, and accordingly, Plaintiffs’ attempts to mischaracterize
7 the relevant policy fail.

8 Third, Plaintiffs’ contend that their RFPs related to the Zero Tolerance Policy,
9 as well as their RFPs requesting documents produced in other litigation involving the
10 Zero Tolerance Policy, are relevant to the claims and defenses in this case. Plaintiffs
11 claim that the creation of and decision to adopt the Policy are relevant to their claims
12 concerning the alleged mental trauma they experienced as a result of separation and
13 the failure of the government to provide mental health screenings and treatment
14 sufficient to address the alleged trauma. Fee Decl. Ex. H (Complaint) ¶¶ 87-95, 178-
15 81, 183-85. This is wrong.

16 Defendants’ foremost objection to Plaintiffs’ First Set of RFPs is that the
17 majority of the RFPs are irrelevant because they primarily, and erroneously, focus on
18 the creation, purpose, and general constitutionality of the Zero Tolerance Policy—
19 issues that are explicitly not a part of this litigation. *See Order at 12-15* (discussing the
20 separate and distinct legal issues between this case and *Ms. L.*). The Court should not
21 permit Plaintiffs to use this case as a means to obtain discovery relevant to a separate
22 lawsuit (*Ms. L.*) and that are irrelevant here.

23 Rather than demonstrate dilatory tactics by the Defendants, the facts outlined
24 above show that Defendants have actively engaged in the meet and confer process.
25 Further, Plaintiffs inaccurately frame the claims and defenses in this case in order to
26 establish the relevancy of many of their RFPs. The Court should find that the majority
27 of Plaintiffs’ RFPs irrelevant to the claims and defenses in this case, and accordingly,
28 should deny Plaintiffs’ Motion to Compel.

1 **II. THE DISPUTED DISCOVERY AND DEFENDANTS' RESPONSES**

2 **REQUEST FOR PRODUCTION NO. 1:**⁵

3 DOCUMENTS sufficient to identify all PUTATIVE CLASS MEMBERS.

4 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 1:**⁶

5 DOJ Defendants object to this request to the extent Plaintiffs purport to require
6 the disclosure of information in the possession, custody, or control of entities other
7 than DOJ Defendants, Fed. R. Civ. P. 34, or seek information that can and should be
8 sought from another entity. To the extent that this request also appears to seek
9 information from DHS or HHS, DOJ Defendants direct Plaintiffs to DHS and HHS
10 Defendants who can provide responses and objections to requests directed to those
11 agencies. *See* DHS and HHS Responses to RFP No. 1. Accordingly, DOJ Defendants
12 do not have any responsive documents.

13 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 1:**⁷

14 DHS Defendants object to this request as Plaintiffs' definition of "putative class
15 members" is overly broad and is not consistent with the Court's definition of the class
16 certified in its November 5, 2019 Order. DHS Defendants also object to this request as
17 overly broad and unduly burdensome because it does not provide any data parameters
18 or limitation on the request for documents. This request is not limited to information
19 generated or existing during a time period that is relevant to the Parties' claims and
20 defenses. Moreover, Request No. 1 does not seek information that is uniquely
21 important to the claims and defenses in this case. Defendant DHS otherwise refers
22 Plaintiffs to Defendants ICE, CBP and HHS for further information consistent with
23

24

⁵ Plaintiffs' First Set of Requests for Production of Documents to Defendants, served
25 on January 10, 2019 are attached as Exhibit C to the Fee Declaration.

26 ⁶ Defendant Department of Justice's and Former Attorney General Sessions'
27 Supplemental Responses to Plaintiffs' First Set of Requests for Production of
28 Documents, served on Plaintiffs on December 17, 2019 are attached as Exhibit D to
the Fee Declaration.

27 ⁷ DHS' Supplemental Responses to Plaintiffs' First Set of Requests for Production of
28 Documents, served on Plaintiffs on December 17, 2019 are attached as Exhibit E to
the Fee Declaration.

1 this Request. *See* HHS Response to RFP No. 1.

2 In consideration of the Court’s November 5, 2019 Order certifying a class, once
3 a protective order is in place, Defendants ICE and CBP, in coordination with the other
4 Federal Defendants, will provide a list of certified class members, to the extent that
5 ICE and CBP have this information and are able to identify certified class members.
6 Defendants will produce a non-privileged, responsive list after the implementation of
7 a protective order in this case.

8 **HHS DEFENDANTS’ SUPPLEMENTAL RESPONSE TO RFP 1:**⁸

9 HHS Defendants object to this request as Plaintiffs’ definition of “putative class
10 members” is overly broad and is not consistent with the Court’s definition of the class
11 certified in its November 5, 2019 Order. This request is overly broad and unduly
12 burdensome in that it does not provide any data parameters or limitation on the request
13 for documents. This request is not limited to information generated or existing during
14 a time period that is relevant to the Parties’ claims and defenses.

15 Moreover, Request for Production No. 1 does not seek information that is
16 uniquely important to the claims and defenses in this case. *See generally* Complaint,
17 ECF No. 1 (“Compl.”) (requesting a court order requiring Defendants to provide
18 mental-health screenings before and after reunification to assess Plaintiffs’ need for
19 subsequent trauma-informed medical and mental-health services and to offer
20 appropriate trauma-informed medical and mental-health services); *see also* Fed. R.
21 Evid. 401 (defining “relevance”); Fed. R. Civ. P. 26(b)(1) (“Parties may obtain
22 discovery regarding any nonprivileged matter that is relevant to any party’s claim or
23 defense and proportional to the needs of the case, considering the importance of the
24 issues at stake in the action, the amount in controversy, the parties’ relative access to
25 relevant information, the parties’ resources, the importance of the discovery in
26 resolving the issues, and whether the burden or expense of the proposed discovery

27 ⁸ Defendant Department of Health and Human Services’ Supplemental Responses to
28 Plaintiffs’ First Set of Requests for Production of Documents, served on Plaintiffs on December 17, 2019 are attached as Exhibit F to the Fee Declaration.

1 outweighs its likely benefit.”). To the extent that this request also appears to seek
2 information from DHS, HHS Defendants direct Plaintiffs to DHS Defendants who can
3 provide responses and objections to requests directed to that agency. *See* DHS
4 Response to RFP No. 1.

5 In consideration of the Court’s November 5, 2019 Order certifying a class, once
6 a protective order is in place, HHS Defendants, in coordination with the other Federal
7 Defendants, will provide a list of class members, to the extent that HHS Defendants
8 have this information and are able to identify class members.

9 **REQUEST FOR PRODUCTION NO. 2:**

10 All DOCUMENTS relating to the decision to adopt the ZERO TOLERANCE
11 SEPARATION Policy, including but not limited to DOCUMENTS related to the
12 potential effects of the ZERO TOLERANCE SEPARATION Policy on the mental
13 health of separated parents and children.

14 **DOJ DEFENDANTS’ SUPPLEMENTAL RESPONSE TO RFP 2:**

15 DOJ Defendants object to this request to the extent it seeks information
16 regarding a “Zero Tolerance Separation Policy,” which does not exist. As previously
17 stated, the “Zero Tolerance Policy” issued by then-Attorney General Sessions, dated
18 April 6, 2018, sets forth a policy regarding referrals for criminal prosecution under 8
19 U.S.C. § 1325(a). Defendants define the Zero Tolerance Policy as a policy that
20 directed each U.S. Attorney’s Office along the Southwest Border to adopt a policy to
21 prosecute all DHS referrals of section 1325(a) violations, to the extent practicable.

22 On May 11, 2018, then-Secretary Nielsen issued a memorandum directing “all
23 DHS law enforcement officers at the border to refer all illegal border crossers to the
24 Department of Justice for criminal prosecution to the extent practicable.”

25 DOJ Defendants object to Request for Production No. 2 as overbroad because it
26 seeks documents and information that are not relevant to the claims and defenses in
27 this case. *See* Fed. R. Evid. 401 (defining “relevance”); Fed. R. Civ. Procedure
28 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is

1 relevant to any party's claim or defense and proportional to the needs of the case,
2 considering the importance of the issues at stake in the action, the amount in
3 controversy, the parties' relative access to relevant information, the parties' resources,
4 the importance of the discovery in resolving the issues, and whether the burden or
5 expense of the proposed discovery outweighs its likely benefit.”). Request for
6 Production No. 2 seeks “all” documents relating to the decision to adopt the Zero
7 Tolerance Separation Policy, regardless of whether that information pertains to the
8 impact of the separations—that occurred as a result of the Zero Tolerance Policy—
9 mental health effects of the alleged family separation policy. Documents and
10 information regarding Defendants' decision to implement the Zero Tolerance Policy is
11 not relevant to Plaintiffs' claims or the relief sought in this case. *See generally*
12 Complaint, ECF No. 1 (“Compl.”) (requesting a court order requiring Defendants to
13 provide mental-health screenings before and after reunification to assess Plaintiffs'
14 need for subsequent trauma-informed medical and mental-health services and to offer
15 appropriate trauma-informed medical and mental-health services).⁹ Specifically, the
16 how or why of the policy has no bearing on Plaintiffs' request for mental health
17 screenings and trauma-informed mental health treatment for class members that
18 Plaintiffs allege is necessary to assess the effect of the separation on class members.

19 DOJ Defendants further object to this request based on relevance, as any
20 response is not likely to lead to the discovery of admissible evidence and, consistent
21 with Fed. R. Civ. P. 26(b)(1), seeks documents and information not relevant to the
22 Plaintiffs' claims or defenses, nor is the burden of such production proportional to the
23 needs of the case. Moreover, DOJ Defendants object that this request is not limited to
24 information generated or existing during a time period that is relevant to the Parties'

25 _____
26 ⁹ Plaintiffs' claims for relief center around their allegations that by forcibly separating
27 Plaintiffs from their children, Defendants have inflicted upon Plaintiffs extraordinary
28 harm that they would not have otherwise faced. They further allege that this separation
caused exceptional distress and trauma and that the plaintiffs have not received any
mental health services from the government since they were separated. [Footnote
Original]

1 claims and defenses. DOJ Defendants object to this request as vague and ambiguous
2 on the basis that it is unclear what is meant by the terms “potential effects” and
3 “mental health.” Finally, DOJ Defendants also object to the request to the extent that it
4 seeks the production of deliberative and pre-decisional or otherwise privileged
5 information. Accordingly, Defendant DOJ will not produce documents for this
6 request.

7 **DHS DEFENDANTS’ SUPPLEMENTAL RESPONSE TO RFP 2:**

8 DHS Defendants object to Request for Production No. 2 as overbroad because it
9 seeks documents and information that are not relevant to the claims and defenses in
10 this case. Request for Production No. 2 seeks “all” documents relating to the decision
11 to adopt the Zero Tolerance Separation Policy, regardless of whether that information
12 pertains to the alleged mental health trauma as a result of the alleged family separation
13 policy. Documents and information regarding Defendants’ decision to implement the
14 Zero Tolerance Policy is not relevant to Plaintiffs’ claims or the relief sought in this
15 case. *See Fed. R. Evid. 401* (defining “relevance”); *Fed. R. Civ. P. 26(b)(1)* (“Parties
16 may obtain discovery regarding any nonprivileged matter that is relevant to any
17 party’s claim or defense and proportional to the needs of the case, considering the
18 importance of the issues at stake in the action, the amount in controversy, the parties’
19 relative access to relevant information, the parties’ resources, the importance of the
20 discovery in resolving the issues, and whether the burden or expense of the proposed
21 discovery outweighs its likely benefit.”) Specifically, the how or why of the alleged
22 policy has no bearing on Plaintiffs’ request for mental health screenings and trauma-
23 informed mental health treatment for class members that Plaintiffs allege is necessary
24 to assess the effect of separation on class members. *See generally* Complaint, ECF No.
25 1 (“Compl.”) (requesting a court order requiring Defendants to provide mental-health
26 screenings before and after reunification to assess Plaintiffs’ need for subsequent
27 trauma-informed medical and mental-health services and to offer appropriate trauma-
28

1 informed medical and mental-health services).¹⁰

2 Moreover, DHS Defendants object to this request as not limited to information
3 generated or existing during a time period that is relevant to the Parties' claims and
4 defenses.

5 DHS Defendants further object to this request because it seeks information
6 regarding a "Zero Tolerance Separation Policy," which does not exist. As previously
7 stated, the "Zero Tolerance Policy" issued by then-Attorney General Sessions, dated
8 April 6, 2018, sets forth a policy regarding referrals for criminal prosecution under
9 U.S.C. § 1325(a). On May 11, 2018, then-Secretary Nielsen issued a memorandum
10 directing "all DHS law enforcement officers at the border to refer all illegal border
11 crossers to the Department of Justice for criminal prosecution to the extent
12 practicable." Finally, DHS Defendants also object to the request to the extent that it
13 seeks the production of deliberative and pre-decisional or otherwise privileged
14 information. Based on these objections, DHS Defendants will not produce documents
15 responsive to this request.

16 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 2:**

17 HHS Defendants object to this request to the extent it seeks privileged
18 documents. HHS Defendants object to Request for Production No. 2 as overbroad
19 because it seeks documents and information that are not relevant to the claims and
20 defenses in this case. *See generally* Compl. (requesting a court order requiring
21 Defendants to provide mental-health screenings before and after reunification to
22 assess Plaintiffs' need for subsequent trauma-informed medical and mental-health
23 services and to offer appropriate trauma-informed medical and mental-health
24 services); *see also* Fed. R. Evid. 401 (defining "relevance"); Fed. R. Civ. Procedure

25
26 ¹⁰ Relevant here, Plaintiffs' claims for relief center around their allegations that by
27 forcibly separating Plaintiffs from their children, Defendants have inflicted upon
28 Plaintiffs extraordinary harm that they would not have otherwise have faced. They
further allege that this separation caused exceptional distress and trauma and that the
plaintiffs have not received any mental health services from the government since they
were separated. [Footnote Original]

1 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is
2 relevant to any party’s claim or defense and proportional to the needs of the case,
3 considering the importance of the issues at stake in the action, the amount in
4 controversy, the parties’ relative access to relevant information, the parties’ resources,
5 the importance of the discovery in resolving the issues, and whether the burden or
6 expense of the proposed discovery outweighs its likely benefit.”). Request for
7 Production No. 2 seeks “all” documents relating to the decision to adopt the Zero
8 Tolerance Separation Policy, regardless of whether that information pertains to the
9 impact of the separations—that occurred as a result of the Zero Tolerance Policy—
10 mental health effects of the alleged family separation policy. Documents and
11 information regarding Defendants’ decision to implement the Zero Tolerance Policy
12 are not relevant to Plaintiffs’ claims or the relief sought in this case. Specifically, the
13 how or why of the policy has no bearing on Plaintiffs’ request for mental health
14 screenings and trauma-informed mental health treatment for class members that
15 Plaintiffs allege is necessary to assess the effect of the separation on class members.

16 HHS further objects to this request because it purports to require the disclosure
17 of information in the possession, custody, or control of entities other than HHS
18 Defendants, Fed. R. Civ. P. 34, or seeks information that can and should be sought
19 from another entity. As noted above, the Zero Tolerance Policy was an enforcement
20 initiative announced by the Department of Justice in conjunction with the Department
21 of Homeland Security. It was not a policy initiative of HHS Defendants. HHS
22 Defendants refer Plaintiffs to DOJ and DHS Defendants. To the extent that this
23 request seeks information from DOJ or DHS, HHS Defendants direct Plaintiffs to
24 DOJ and DHS Defendants who can provide responses and objections to requests
25 directed to those agencies. Based on these objections, HHS Defendants will not
26 produce documents responsive to this request.

27 **REQUEST FOR PRODUCTION NO. 3:**

28 All DOCUMENTS related to the potential or actual effects of the ZERO

1 TOLERANCE SEPARATION Policy on the mental health of separated parents and
2 children.

3 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 3:**

4 DOJ Defendants object to this request to the extent it appears to require the
5 disclosure of information in the possession, custody, or control of entities other than
6 DOJ Defendants, Fed. R. Civ. P. 34. To the extent that this request appears to seek
7 information from DHS or HHS, DOJ Defendants direct Plaintiffs to DHS and HHS
8 Defendants who can provide responses and objections to requests directed to those
9 agencies. Moreover, DOJ Defendants object to this request to the extent it seeks
10 information regarding a “Zero Tolerance Separation Policy,” which does not exist.
11 The Zero Tolerance Policy issued by then-Attorney General Sessions, dated April 6,
12 2018, sets forth a policy regarding referrals for criminal prosecution under 8 U.S.C. §
13 1325(a). Defendants define the Zero Tolerance Policy as a policy that directed each
14 U.S. Attorney’s Office along the Southwest Border to adopt a policy to prosecute all
15 DHS referrals of section 1325(a) violations, to the extent practicable. On May 11,
16 2018, then-Secretary Nielsen issued a memorandum directing “all DHS law
17 enforcement officers at the border to refer all illegal border crossers to the Department
18 of Justice for criminal prosecution to the extent practicable.”

19 DOJ Defendants further object to this request as overly broad and unduly
20 burdensome and not limited in time or scope. Request for Production No. 3 is not
21 limited to information generated or existing during a time period that is relevant to the
22 Parties’ claims and defenses. *See* Fed. R. Evid. 401 (defining “relevance”); Fed. R.
23 Civ. Procedure 26(b)(1). DOJ Defendants object to this request as it appears to require
24 a government-wide search for documents. Such a government-wide search would be
25 oppressive, overly burdensome, and overbroad given the claims and defenses in this
26 matter. *See generally* Compl., ECF No. 1. DOJ Defendants object to this request as
27 vague and ambiguous on the basis that it is unclear what is meant by “potential or
28 actual effects” and “mental health.” DOJ Defendants also object to the request to the

1 extent that it seeks the production of deliberative and pre-decisional or otherwise
2 privileged information. Based on these objections, DOJ Defendants will not produce
3 documents for this request.

4 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 3:**

5 DHS Defendants object to this request as overly broad and unduly burdensome
6 and not limited in time or scope. Request No. 3 is not limited to information generated
7 or existing during a time period that is relevant to the Parties' claims and defenses. *See*
8 Fed. R. Evid. 401 (defining "relevance"); Fed. R. Civ. P. 26(b)(1). DHS Defendants
9 object to this request as it appears to require a government-wide search for documents.
10 Such a government-wide search would be oppressive, overly burdensome and
11 overbroad, given the claims and defenses in this matter. DHS Defendants further
12 object to this request to the extent it appears to require the disclosure of information in
13 the possession, custody or control of entities other than DHS Defendants and exceeds
14 the permissible scope of discovery under Fed. R. Civ. P. 34. To the extent that this
15 request appears to seek information from DOJ or HHS, DHS Defendants direct
16 Plaintiffs to DOJ and HHS Defendants who can provide responses and objections to
17 requests directed to those agencies.

18 DHS Defendants object to this request as vague and ambiguous on the basis that
19 it is unclear what is meant by "potential or actual effects" and "mental health." DHS
20 Defendants further object to this request because it seeks information regarding a
21 "Zero Tolerance Separation Policy," which does not exist. The Zero Tolerance Policy
22 issued by then-Attorney General Sessions, dated April 6, 2018, sets forth a policy
23 regarding referrals for criminal prosecution under 8 U.S.C. § 1325(a). On May 11,
24 2018, then-Secretary Nielsen issued a memorandum directing "all DHS law
25 enforcement officers at the border to refer all illegal border crossers to the Department
26 of Justice for criminal prosecution to the extent practicable." Finally, DHS Defendants
27 also object to the request to the extent that it seeks the production of deliberative and
28 pre-decisional or otherwise privileged information. Based on these objections, DHS

1 Defendants will not produce documents responsive to this request.

2 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 3:**

3 HHS Defendants object to this request to the extent it seeks privileged
4 documents. HHS Defendants further object to this request to the extent it seeks
5 information regarding a “Zero Tolerance Separation Policy,” which does not exist.
6 The Zero Tolerance Policy issued by then-Attorney General Sessions, dated April 6,
7 2018, sets forth a policy regarding referrals for criminal prosecution under 8 U.S.C. §
8 1325(a). On May 11, 2018, then-Secretary Nielsen issued a memorandum directing
9 “all DHS law enforcement officers at the border to refer all illegal border crossers to
10 the Department of Justice for criminal prosecution to the extent practicable.”

11 HHS Defendants further object to this request as overly broad, unduly
12 burdensome, and not limited in time or scope. Request for Production No. 3 is not
13 limited to information generated or existing during a time period that is relevant to the
14 Parties’ claims and defenses. *See generally* Compl. (requesting a court order requiring
15 Defendants to provide mental-health screenings before and after reunification to
16 assess Plaintiffs’ need for subsequent trauma-informed medical and mental-health
17 services and to offer appropriate trauma-informed medical and mental-health
18 services); *see also* Fed. R. Evid. 401 (defining “relevance”); Fed. R. Civ. Procedure
19 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is
20 relevant to any party’s claim or defense and proportional to the needs of the case,
21 considering the importance of the issues at stake in the action, the amount in
22 controversy, the parties’ relative access to relevant information, the parties’ resources,
23 the importance of the discovery in resolving the issues, and whether the burden or
24 expense of the proposed discovery outweighs its likely benefit.”). HHS Defendants
25 object to this request as it appears to require a government-wide search for documents.
26 Such a government-wide search would be oppressive, overly burdensome, and
27 overbroad given the claims and defenses in this matter. Moreover, HHS Defendants
28 object to this request because it seeks to require the disclosure of information in the

1 possession, custody, or control of entities other than HHS Defendants, Fed. R. Civ. P.
2 34.

3 To the extent that this request appears to seek information from DOJ or DHS,
4 HHS Defendants direct Plaintiffs to DOJ and DHS Defendants who can provide
5 responses and objections to requests directed to those agencies. HHS Defendants
6 further object to this request as vague and ambiguous on the basis that it is unclear
7 what is meant by “potential or actual effects” and “mental health.” It is unclear what
8 types of documents Plaintiffs are seeking in their request. Based on these objections,
9 HHS Defendants will produce a sampling of the separated children’s health
10 information that might be responsive to this request.

11 **REQUEST FOR PRODUCTION NO. 4:**

12 All DOCUMENTS related to YOUR press releases or internal memoranda that
13 announced, explained, or implemented the ZERO TOLERANCE SEPARATION
14 Policy, including but not limited to the internal memoranda themselves, drafts of those
15 press releases or internal memoranda, and any memoranda or guidance about how to
16 respond to questions from media or PUTATIVE CLASS MEMBERS.

17 **DOJ DEFENDANTS’ SUPPLEMENTAL RESPONSE TO RFP 4:**

18 DOJ Defendants object to this request to the extent it seeks information
19 regarding a “Zero Tolerance Separation Policy,” which does not exist. The Zero
20 Tolerance Policy issued by then-Attorney General Sessions, dated April 6, 2018, sets
21 forth a policy regarding referrals for criminal prosecution under 8 U.S.C. § 1325(a).
22 Defendants define the Zero Tolerance Policy as a policy that directed each U.S.
23 Attorney’s Office along the Southwest Border to adopt a policy to prosecute all DHS
24 referrals of section 1325(a) violations, to the extent practicable. On May 11, 2018,
25 then-Secretary Nielsen issued a memorandum directing “all DHS law enforcement
26 officers at the border to refer all illegal border crossers to the Department of Justice
27 for criminal prosecution to the extent practicable.”

28 DOJ Defendants object to Request for Production No. 4 as overbroad because it

1 seeks documents and information that are not relevant to the claims and defenses in
2 this case. *See Fed. R. Evid. 401* (defining “relevance”); *Fed. R. Civ. Procedure*
3 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is
4 relevant to any party’s claim or defense and proportional to the needs of the case,
5 considering the importance of the issues at stake in the action, the amount in
6 controversy, the parties’ relative access to relevant information, the parties’ resources,
7 the importance of the discovery in resolving the issues, and whether the burden or
8 expense of the proposed discovery outweighs its likely benefit.”). Request for
9 Production No. 4 seeks “all” documents relating to the press releases and internal
10 memoranda that announced, explained, or implemented the “Zero Tolerance
11 Separation Policy,” regardless of whether that information pertains to the alleged
12 mental health effects of the alleged family separation policy. Documents and
13 information regarding Defendants’ decision to implement the Zero Tolerance Policy is
14 not relevant to Plaintiffs’ claims or the relief sought in this case. Specifically, the how
15 or why of the policy has no bearing on Plaintiffs’ request for mental health screenings
16 and trauma-informed mental health treatment for class members that Plaintiffs allege
17 is necessary to assess the effect of separation on class members. *See generally* Compl.,
18 ECF No. 1. DOJ Defendants further object that Request for Production No. 4 seeks
19 information that is publicly available or available from other sources. *See Fed. R. Civ.*
20 P. 26(b)(2)(C)(i) (“[T]he court must limit the frequency or extent of discovery [that]
21 can be obtained from some other source that is more convenient, less burdensome, or
22 less expensive.”). Finally, DOJ Defendants also object to the request to the extent that
23 it seeks the production of deliberative and pre-decisional or otherwise privileged
24 information. Based on these objections, DOJ Defendants will not produce documents
25 for this request.

26 **DHS DEFENDANTS’ SUPPLEMENTAL RESPONSE TO RFP 4:**

27 DHS Defendants object to this request as Plaintiffs’ definition of “putative class
28 members” is overly broad and is not consistent with the Court’s definition of the class

1 certified in its November 5, 2019 Order. DHS Defendants object to Request for
2 Production No. 4 as overbroad because it seeks documents and information that are
3 not relevant to the claims and defenses in this case. Request for Production No. 4
4 seeks “all” documents relating to the press releases and internal memoranda that
5 announced, explained, or implemented the “Zero Tolerance Separation Policy,”
6 regardless of whether that information pertains to the alleged mental health effects of
7 the alleged family separation policy. Documents and information regarding
8 Defendants’ decision to implement the Zero Tolerance Policy is not relevant to
9 Plaintiffs’ claims or the relief sought in this case. *See* Fed. R. Evid. 401 (defining
10 “relevance”); Fed. R. Civ. P. 26(b)(1). Specifically, the how or why of the alleged
11 policy has no bearing on Plaintiffs’ request for mental health screenings and trauma-
12 informed mental health treatment for class members that Plaintiffs allege is necessary
13 to assess the effect of separation on class members. *See generally* Compl., ECF No. 1.

14 Moreover, DHS Defendants object to this request to the extent it seeks
15 information regarding a “Zero Tolerance Separation Policy,” which does not exist.
16 The Zero Tolerance Policy issued by then-Attorney General Sessions, dated April 6,
17 2018, sets forth a policy regarding referrals for criminal prosecution under 8 U.S.C. §
18 1325(a). On May 11, 2018, then-Secretary Nielsen issued a memorandum directing
19 “all DHS law enforcement officers at the border to refer all illegal border crossers to
20 the Department of Justice for criminal prosecution to the extent practicable.” DHS
21 Defendants further object that Request for Production No. 4 seeks information that is
22 publicly available or available from other sources. *See* Fed. R. Civ. P. 26(b)(2)(C)(i)
23 (“[T]he court must limit the frequency or extent of discovery [that] can be obtained
24 from some other source that is more convenient, less burdensome, or less
25 expensive.”). Finally, DHS Defendants also object to the request to the extent that it
26 seeks the production of deliberative and pre-decisional or otherwise privileged
27 information. Based on these objections, DHS Defendants will not produce documents
28 responsive to this request.

1 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 4:**

2 HHS Defendants object to this request to the extent it seeks privileged
3 documents. HHS Defendants further object to this request as overbroad because it
4 seeks documents and information that are not relevant to the claims and defenses in
5 this case. *See generally* Compl. (requesting a court order requiring Defendants to
6 provide mental-health screenings before and after reunification to assess Plaintiffs'
7 need for subsequent trauma-informed medical and mental-health services and to offer
8 appropriate trauma-informed medical and mental-health services); *see also* Fed. R.
9 Evid. 401 (defining "relevance"); Fed. R. Civ. Procedure 26(b)(1) ("Parties may
10 obtain discovery regarding any nonprivileged matter that is relevant to any party's
11 claim or defense and proportional to the needs of the case, considering the importance
12 of the issues at stake in the action, the amount in controversy, the parties' relative
13 access to relevant information, the parties' resources, the importance of the discovery
14 in resolving the issues, and whether the burden or expense of the proposed discovery
15 outweighs its likely benefit.").

16 Moreover, HHS Defendants object to this request because it seeks to require the
17 disclosure of information in the possession, custody, or control of entities other than
18 HHS Defendants, Fed. R. Civ. P. 34, or seeks information that can and should be
19 sought from another entity. To the extent that this request seeks information from DOJ
20 or DHS, HHS Defendants direct Plaintiffs to DOJ and DHS Defendants who can
21 provide responses and objections to requests directed to those agencies. As noted
22 above, the Zero Tolerance Policy was an enforcement initiative announced by the
23 Department of Justice in conjunction with the Department of Homeland Security. It
24 was not a policy initiative of HHS Defendants. Based on these objections, HHS
25 Defendants will not produce documents responsive to this request.

26 **REQUEST FOR PRODUCTION NO. 5:**

27 All DOCUMENTS relating to the consideration of family separation as a means
28 to deter immigration, including but not limited to the consideration of family

1 separation discussed by then-DHS Secretary John Kelly on CNN on or about March 6,
2 2017.

3 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 5:**

4 DOJ Defendants object to Request for Production No. 5 as overbroad because it
5 seeks documents and information that are not relevant to the claims and defenses in
6 this case. *See Fed. R. Evid. 401* (defining “relevance”); *Fed. R. Civ. Procedure*
7 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is
8 relevant to any party’s claim or defense and proportional to the needs of the case,
9 considering the importance of the issues at stake in the action, the amount in
10 controversy, the parties’ relative access to relevant information, the parties’ resources,
11 the importance of the discovery in resolving the issues, and whether the burden or
12 expense of the proposed discovery outweighs its likely benefit.”). Request for
13 Production No. 5 seeks “all” documents relating to “the consideration of family
14 separation as a means to deter immigration,” regardless of whether that information
15 pertains to the alleged mental health effects of the alleged family separation policy.
16 Specifically, the how or why of the policies has no bearing on Plaintiffs’ request for
17 mental health screenings and trauma-informed mental health treatment for class
18 members that Plaintiffs allege is necessary to assess the effect of separation on class
19 members. To this extent that this request references a statement, this request does not
20 specify to which statement the request refers. DOJ Defendants further object to this
21 request as vague and ambiguous on the basis that it is unclear what is meant by
22 “relating to consideration of family separation.” Moreover, because this request
23 appears to require a government-wide search for documents. Such a government-wide
24 search would be oppressive, overly burdensome and overbroad, given the claims and
25 defenses in this matter, which relate to a discrete issue. Further, this request is overly
26 broad and unduly burdensome in that it does not provide any data parameters or
27 limitation on the request for documents. And this request is not limited to information
28 generated or existing during a time period that is relevant to the Parties’ claims and

1 defenses. Finally, DOJ Defendants also object to the request to the extent that it seeks
2 the production of deliberative and pre-decisional or otherwise privileged information.
3 Based on these objections, DOJ Defendants will not produce documents for this
4 request.

5 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 5:**

6 DHS Defendants object to Request for Production No. 5 as overbroad because it
7 seeks documents and information that are not relevant to the claims and defenses in
8 this case. Request for Production No. 5 seeks “all” documents relating to “the
9 consideration of family separation as a means to deter immigration,” regardless of
10 whether that information pertains to the alleged mental health effects of the alleged
11 family separation policy. *See Fed. R. Evid. 401* (defining “relevance”); *Fed. R. Civ. P.*
12 26(b)(1). Specifically, the how or why of the policies has no bearing on Plaintiffs’
13 request for mental health screenings and trauma-informed mental health treatment for
14 class members that Plaintiffs allege is necessary to assess the effect of separation on
15 class members. *See generally* Compl., ECF No. 1. To the extent that this request
16 references a statement, this request does not specify to which statement the request
17 refers. DHS Defendants object to this request as vague and ambiguous on the basis
18 that it is unclear what is meant by “relating to consideration of family separation.”
19 Finally, DHS Defendants also object to the request to the extent that it seeks the
20 production of deliberative and pre-decisional or otherwise privileged information.
21 Based on these objections, DHS Defendants will not produce documents responsive to
22 this request.

23 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 5:**

24 HHS Defendants object to Request for Production No. 5 as overbroad because it
25 seeks documents and information that are not relevant to the claims and defenses in
26 this case. *See generally* Compl. (requesting a court order requiring Defendants to
27 provide mental-health screenings before and after reunification to assess Plaintiffs’
28 need for subsequent trauma-informed medical and mental-health services and to offer

1 appropriate trauma-informed medical and mental-health services); *see also* Fed. R.
2 Evid. 401 (defining “relevance”); Fed. R. Civ. Procedure 26(b)(1) (“Parties may
3 obtain discovery regarding any nonprivileged matter that is relevant to any party’s
4 claim or defense and proportional to the needs of the case, considering the importance
5 of the issues at stake in the action, the amount in controversy, the parties’ relative
6 access to relevant information, the parties’ resources, the importance of the discovery
7 in resolving the issues, and whether the burden or expense of the proposed discovery
8 outweighs its likely benefit.”). HHS Defendants also object to the request to the extent
9 that it seeks the production of deliberative and pre-decisional or otherwise privileged
10 information.

11 Moreover, HHS Defendants object to this request because it seeks to require the
12 disclosure of information in the possession, custody, or control of entities other than
13 HHS Defendants, Fed. R. Civ. P. 34, or seeks information that can and should be
14 sought from another entity. To the extent that this request appears to seek information
15 from DHS, HHS Defendants direct Plaintiffs to DHS Defendants who can provide
16 responses and objections to requests directed to that agency. John Kelly was the
17 Secretary of the Department of Homeland Security, not the Secretary of Health and
18 Human Services. Based on these objections, HHS Defendants will not produce
19 documents responsive to this request.

20 **REQUEST FOR PRODUCTION NO. 6:**

21 All DOCUMENTS relating to YOUR consideration of alternatives to detention
22 of the PUTATIVE CLASS MEMBERS that would allow families to remain together,
23 including but not limited to community supported models such as the Family Case
24 Management Program that was initially implemented in January 2016.

25 **DOJ DEFENDANTS’ SUPPLEMENTAL RESPONSE TO RFP 6:**

26 DOJ Defendants object to this request to the extent Plaintiffs purport to require
27 the disclosure of information in the possession, custody, or control of entities other
28 than DOJ Defendants, Fed. R. Civ. P. 34, or seek information that can and should be

1 sought from another entity. Finally, DOJ Defendants also object to the request to the
2 extent that it seeks the production of deliberative and pre-decisional or otherwise
3 privileged information. To the extent that this request appears to seek information
4 from DHS, DOJ Defendants direct Plaintiffs to DHS Defendants who can provide
5 responses and objections to requests directed to those agencies. Accordingly, DOJ
6 Defendants do not have any responsive documents.

7 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 6:**

8 DHS Defendants object to this request as overly broad and unduly burdensome
9 and not limited in time or scope. DHS Defendants object to Request for Production
10 No. 6 as overbroad because it seeks documents and information that are not relevant
11 to the claims and defenses in this case. *See Fed. R. Evid. 401* (defining “relevance”);
12 *Fed. R. Civ. P. 26(b)(1)*. Rather, Request for Production No. 6 seeks information
13 about alternatives to detention, including the Family Case Management Program.
14 Alternatives to detentions programs have no bearing on Plaintiffs’ request for mental
15 health screenings and trauma-informed mental health treatment for class members that
16 Plaintiffs allege is necessary to assess the effect of separation on class members. *See*
17 *generally* Compl., ECF No. 1. Finally, DHS Defendants also object to the request to
18 the extent that it seeks the production of deliberative and pre-decisional or otherwise
19 privileged information. Based on these objections, Defendant DHS and Defendant
20 CBP will not produce documents responsive to this request.

21 Defendant ICE further objects to producing documents relating to the Family
22 Case Management Program in 2017 on the basis that this time period preceded the
23 implementation of the Zero Tolerance Policy. The Family Case Management Program
24 terminated in June 2017, and this Court’s November 5, 2019 Order certified a class of
25 adults parents who, in relevant part, “on or after July 1, 2017, were, are, or will be
26 detained in immigration custody by DHS.” Thus this request is not proportional to the
27 needs of this case, as this lawsuit pertains to the alleged mental health effects of the
28 separation on class members, and thus documents pertaining to the Family Case

1 Management Program are outside the scope of this lawsuit. Thus, Defendant ICE will
2 not produce any documents responsive to this request.

3 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 6:**

4 HHS Defendants object to Request for Production No. 6 as overbroad because it
5 seeks documents and information that are not relevant to the claims and defenses in
6 this case. *See generally* Compl. (requesting a court order requiring Defendants to
7 provide mental-health screenings before and after reunification to assess Plaintiffs'
8 need for subsequent trauma-informed medical and mental-health services and to offer
9 appropriate trauma-informed medical and mental-health services); *see also* Fed. R.
10 Evid. 401 (defining "relevance"); Fed. R. Civ. Procedure 26(b)(1) ("Parties may
11 obtain discovery regarding any nonprivileged matter that is relevant to any party's
12 claim or defense and proportional to the needs of the case, considering the importance
13 of the issues at stake in the action, the amount in controversy, the parties' relative
14 access to relevant information, the parties' resources, the importance of the discovery
15 in resolving the issues, and whether the burden or expense of the proposed discovery
16 outweighs its likely benefit.").

17 Moreover, HHS Defendants object to this request because it seeks to require the
18 disclosure of information in the possession, custody, or control of entities other than
19 HHS Defendants, Fed. R. Civ. P. 34, or seeks information that can and should be
20 sought from another entity. To the extent that this request appears to seek information
21 from DOJ or DHS, HHS Defendants direct Plaintiffs to DOJ and DHS Defendants
22 who can provide responses and objections to requests directed to those agencies. The
23 Family Case Management Program was a Department of Homeland Security program.
24 Based on these objections, HHS Defendants will not produce documents responsive to
25 this request.

26 **REQUEST FOR PRODUCTION NO. 7:**

27 All DOCUMENTS related to the decision to close the Family Case
28 Management Program in 2017.

1 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 7:**

2 DOJ Defendants also object to the request to the extent that it seeks the
3 production of deliberative and pre-decisional or otherwise privileged information.
4 DOJ Defendants object to this request to the extent Plaintiffs purport to require the
5 disclosure of information in the possession, custody, or control of entities other than
6 DOJ Defendants, Fed. R. Civ. P. 34, or to the extent, Plaintiffs seek information that
7 can and should be sought from another entity. To the extent that this request appears
8 to seek information from DHS, DOJ Defendants direct Plaintiffs to DHS Defendants
9 who can provide responses and objections to requests directed to those agencies.

10 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 7:**

11 DHS Defendants object to Request for Production No. 7 as overbroad because it
12 seeks documents and information that are not relevant to the claims and defenses in
13 this case. *See* Fed. R. Evid. 401 (defining “relevance”); Fed. R. Civ. P. 26(b)(1).
14 Request for Production No. 7 seeks information about the government’s decision to
15 terminate the Family Case Management Program. This decision has no bearing on
16 Plaintiffs’ request for mental health screenings and trauma-informed mental health
17 treatment for class members that Plaintiffs allege is necessary to assess the effect of
18 separation on class members. *See generally* Compl., ECF No. 1. Defendant DHS and
19 Defendant CBP refer Plaintiffs to Defendant ICE for information related to the Family
20 Case Management Program. Finally, DHS Defendants also object to the request to the
21 extent that it seeks the production of deliberative and pre-decisional or otherwise
22 privileged information. Based on these objections, Defendant DHS and Defendant
23 CBP will not produce documents responsive to this request.

24 Defendant ICE objects to producing documents relating to the Family Case
25 Management Program in 2017 on the basis that this time period preceded the
26 implementation of the zero tolerance policy, and thus is not proportional to the needs
27 of this case. The Family Case Management Program terminated in June 2017, and this
28 Court’s November 5, 2019 Order, certified a class of adults parents who, in relevant

1 part, “on or after July 1, 2017, were, are, or will be detained in immigration custody
2 by DHS”, as this lawsuit pertains to the alleged mental health effects of the separation
3 of families, and thus documents pertaining to the Family Case Management Program
4 are outside the scope of this lawsuit. Based on these objections, Defendant ICE will
5 not produce any documents responsive to this request.

6 **HHS DEFENDANTS’ SUPPLEMENTAL RESPONSE TO RFP 7:**

7 HHS Defendants object to Request for Production No. 7 as overbroad because it
8 seeks documents and information that are not relevant to the claims and defenses in
9 this case. *See generally* Compl. (requesting a court order requiring Defendants to
10 provide mental-health screenings before and after reunification to assess Plaintiffs’
11 need for subsequent trauma-informed medical and mental-health services and to offer
12 appropriate trauma-informed medical and mental-health services); *see also* Fed. R.
13 Evid. 401 (defining “relevance”); Fed. R. Civ. Procedure 26(b)(1) (“Parties may
14 obtain discovery regarding any nonprivileged matter that is relevant to any party’s
15 claim or defense and proportional to the needs of the case, considering the importance
16 of the issues at stake in the action, the amount in controversy, the parties’ relative
17 access to relevant information, the parties’ resources, the importance of the discovery
18 in resolving the issues, and whether the burden or expense of the proposed discovery
19 outweighs its likely benefit.”).

20 Moreover, HHS Defendants object to this request because it seeks to require the
21 disclosure of information in the possession, custody, or control of entities other than
22 HHS Defendants, Fed. R. Civ. P. 34, or seeks information that can and should be
23 sought from another entity. The Family Case Management Program was a Department
24 of Homeland Security program. To the extent that this request appears to seek
25 information from DOJ or DHS, HHS Defendants direct Plaintiffs to DOJ and DHS
26 Defendants who can provide responses and objections to requests directed to those
27 agencies. Based on these objections, HHS Defendants will not produce documents
28 responsive to this request.

1 **REQUEST FOR PRODUCTION NO. 8:**

2 All DOCUMENTS relating to any programs YOU have implemented to
3 mitigate or remediate the mental health impact of the ZERO TOLERANCE
4 SEPARATION Policy on the PUTATIVE CLASS MEMBERS or their children.

5 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 8:**

6 DOJ Defendants object to this request to the extent it seeks information
7 regarding a “Zero Tolerance Separation Policy,” which does not exist. The Zero
8 Tolerance Policy issued by then-Attorney General Sessions, dated April 6, 2018, sets
9 forth a policy regarding referrals for criminal prosecution under 8 U.S.C. § 1325(a).
10 Defendants define the Zero Tolerance Policy as a policy that directed each U.S.
11 Attorney’s Office along the Southwest Border to adopt a policy to prosecute all DHS
12 referrals of section 1325(a) violations, to the extent practicable. On May 11, 2018,
13 then-Secretary Nielsen issued a memorandum directing “all DHS law enforcement
14 officers at the border to refer all illegal border crossers to the Department of Justice
15 for criminal prosecution to the extent practicable.”

16 DOJ Defendants further object to this request as overly broad and unduly
17 burdensome and not limited in time or scope. Request for Production No. 8 is not
18 limited to information generated or existing during a time period that is relevant to the
19 Parties’ claims and defenses. DOJ Defendants object to this request as vague and
20 ambiguous on the basis that it is unclear what is meant by “mental health impact.”
21 Finally, DOJ Defendants also object to the request to the extent that it seeks the
22 production of deliberative and pre-decisional or otherwise privileged information.

23 DOJ Defendants object to this request to the extent Plaintiffs purport to require
24 the disclosure of information in the possession, custody, or control of entities other
25 than DOJ Defendants, Fed. R. Civ. P. 34, or seek information that can and should be
26 sought from another entity. DOJ Defendants are not the entity statutorily responsible
27 for the custody and care of individuals in detention. Defendant DOJ refers Plaintiffs to
28 DHS and HHS Defendants. To the extent that this request appears to seek information

1 from DHS and HHS, DOJ Defendants direct Plaintiffs to DHS and HHS Defendants
2 who can provide responses and objections to requests directed to those agencies. *See*
3 DHS and HHS Responses to RFP No. 8. Accordingly, DOJ Defendants do not have
4 any responsive documents.

5 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 8:**

6 DHS Defendants object to this request as Plaintiffs' definition of "putative class
7 members" is overly broad and is not consistent with the Court's definition of the class
8 certified in its November 5, 2019 Order. DHS Defendants object to this request as
9 vague and ambiguous on the basis that it is unclear what is meant by "mitigate or
10 remediate" and "mental health impact." DHS Defendants object to this request to the
11 extent it seeks information regarding a "Zero Tolerance Separation Policy," which
12 does not exist. The Zero Tolerance Policy issued by then-Attorney General Sessions,
13 dated April 6, 2018, sets forth a policy regarding referrals for criminal prosecution
14 under 8 U.S.C. § 1325(a). On May 11, 2018, then-Secretary Nielsen issued a
15 memorandum directing "all DHS law enforcement officers at the border to refer all
16 illegal border crossers to the Department of Justice for criminal prosecution to the
17 extent practicable." Finally, DHS Defendants also object to the request to the extent
18 that it seeks the production of deliberative and pre-decisional or otherwise privileged
19 information. Notwithstanding these objections, DHS Defendants will produce non-
20 privileged, responsive documents after the implementation of a protective order in this
21 case. In addition, to the extent that Defendants are producing documents responsive to
22 this request, we anticipate producing any responsive electronically stored information
23 pursuant to an ESI protocol, once that protocol is in place. *See also* HHS Response to
24 RFP No. 8.

25 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 8:**

26 Defendants object to this request as Plaintiffs' definition of "putative class
27 members" is overly broad and is not consistent with the Court's definition of the class
28 certified in its November 5, 2019 order. HHS Defendants object to this request to the

1 extent it seeks information regarding a “Zero Tolerance Separation Policy,” which
2 does not exist. The Zero Tolerance Policy issued by then-Attorney General Sessions,
3 dated April 6, 2018, sets forth a policy regarding referrals for criminal prosecution
4 under 8 U.S.C. § 1325(a). On May 11, 2018, then-Secretary Nielsen issued a
5 memorandum directing “all DHS law enforcement officers at the border to refer all
6 illegal border crossers to the Department of Justice for criminal prosecution to the
7 extent practicable.”

8 HHS Defendants further object to this request as overly broad and unduly
9 burdensome and not limited in time or scope. Request for Production No. 8 is not
10 limited to information generated or existing during a time period that is relevant to the
11 Parties’ claims and defenses. HHS Defendants object to this request as vague and
12 ambiguous on the basis that it is unclear what is meant by “mental health impact.”

13 Notwithstanding the general and specific objections, and without waiving any
14 objections, HHS will produce non-privileged, responsive documents on a rolling basis
15 after the Court enters an appropriate protective order. *See also* DHS Response to RFP
16 No. 8.

17 **REQUEST FOR PRODUCTION NO. 9:**

18 All DOCUMENTS, analyses, reports, and drafts thereof supporting Defendant
19 Nielsen’s assertion that the ZERO TOLERANCE SEPARATION Policy was
20 necessary due to the marked increase in the number of adults arriving at the border
21 with children and fraudulently claiming to be a family unit.

22 **DOJ DEFENDANTS’ SUPPLEMENTAL RESPONSE TO RFP 9:**

23 DOJ Defendants object to this request to the extent it seeks information
24 regarding a “Zero Tolerance Separation Policy,” which does not exist. The Zero
25 Tolerance Policy issued by then-Attorney General Sessions, dated April 6, 2018, sets
26 forth a policy regarding referrals for criminal prosecution under 8 U.S.C. § 1325(a).
27 On May 11, 2018, then-Secretary Nielsen issued a memorandum directing “all DHS
28 law enforcement officers at the border to refer all illegal border crossers to the

1 Department of Justice for criminal prosecution to the extent practicable.”

2 DOJ Defendants object to this request as ambiguous, as it fails to identify a
3 specific statement or representation by former Secretary Nielsen for which related
4 documents are sought. DOJ Defendants also object to the request to the extent that it
5 seeks the production of deliberative and pre-decisional or otherwise privileged
6 information.

7 DOJ Defendants further object to Request for Production No. 9 as overbroad
8 because it seeks documents and information that are not relevant to the claims and
9 defenses in this case. To the extent that Plaintiffs seek information regarding the
10 government’s decision to implement the Zero Tolerance Policy, this decision has no
11 bearing on Plaintiffs’ request for mental health screenings and trauma-informed
12 mental health treatment for class members that Plaintiffs allege is necessary to assess
13 the effect of separation on class members. *See Fed. R. Evid. 401*(defining
14 “relevance”); *Fed. R. Civ. Procedure 26(b)(1)* (“Parties may obtain discovery
15 regarding any nonprivileged matter that is relevant to any party’s claim or defense and
16 proportional to the needs of the case, considering the importance of the issues at stake
17 in the action, the amount in controversy, the parties’ relative access to relevant
18 information, the parties’ resources, the importance of the discovery in resolving the
19 issues, and whether the burden or expense of the proposed discovery outweighs its
20 likely benefit.”). This request is also not limited to information generated or existing
21 during a time period that is relevant to the Parties’ claims and defenses.

22 DOJ Defendants object to this request to the extent Plaintiffs purport to require
23 the disclosure of information in the possession, custody, or control of entities other
24 than DOJ Defendants, *Fed. R. Civ. P. 34*, or seek information that can and should be
25 sought from another entity. Then-Secretary Nielson was the Secretary of the
26 Department of Homeland Security—a separate agency from the Department of
27 Justice. To the extent that this request appears to seek information from DHS, DOJ
28 Defendants direct Plaintiffs to DHS Defendants who can provide responses and

1 objections to requests directed to that agency. Finally, DOJ Defendants also object to
2 the request to the extent that it seeks the production of deliberative and pre-decisional
3 or otherwise privileged information. Based on these objections, DOJ Defendants will
4 not produce documents for this request.

5 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 9:**

6 DHS Defendants object to this request as ambiguous, as it fails to identify a
7 specific statement or representation by former Secretary Nielsen for which related
8 documents are sought. DHS Defendants object to this request because it seeks
9 information regarding a “Zero Tolerance Separation Policy,” which does not exist.
10 The Zero Tolerance Policy issued by then-Attorney General Sessions, dated April 6,
11 2018, sets forth a policy regarding referrals for criminal prosecution under 8 U.S.C. §
12 1325(a). On May 11, 2018, then-Secretary Nielsen issued a memorandum directing
13 “all DHS law enforcement officers at the border to refer all illegal border crossers to
14 the Department of Justice for criminal prosecution to the extent practicable.” DHS
15 Defendants further object to Request for Production No. 9 as overbroad because it
16 seeks documents and information that are not relevant to the claims and defenses in
17 this case. *See* Fed. R. Evid. 401 (defining “relevance”); Fed. R. Civ. P. 26(b)(1). To
18 the extent that Plaintiffs seek information regarding the government’s decision to
19 implement the Zero Tolerance Policy, this decision has no bearing on Plaintiffs’
20 request for mental health screenings and trauma-informed mental health treatment for
21 class members that Plaintiffs allege is necessary to assess the effect of separation on
22 class members. *See* Compl., ECF No. 1. This request is also not limited to information
23 generated or existing during a time period that is relevant to the Parties’ claims and
24 defenses. Finally, DHS Defendants also object to the request to the extent that it seeks
25 the production of deliberative and pre-decisional or otherwise privileged information.
26 Based on these objections, DHS Defendants will not produce documents responsive to
27 this request.

28

1 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 9:**

2 HHS Defendants object to Request for Production No. 9 as overbroad because it
3 seeks documents and information that are not relevant to the claims and defenses in
4 this case. *See generally* Compl. (requesting a court order requiring Defendants to
5 provide mental-health screenings before and after reunification to assess Plaintiffs'
6 need for subsequent trauma-informed medical and mental-health services and to offer
7 appropriate trauma-informed medical and mental-health services); *see also* Fed. R.
8 Evid. 401 (defining "relevance"); Fed. R. Civ. Procedure 26(b)(1) ("Parties may
9 obtain discovery regarding any nonprivileged matter that is relevant to any party's
10 claim or defense and proportional to the needs of the case, considering the importance
11 of the issues at stake in the action, the amount in controversy, the parties' relative
12 access to relevant information, the parties' resources, the importance of the discovery
13 in resolving the issues, and whether the burden or expense of the proposed discovery
14 outweighs its likely benefit.").

15 Moreover, HHS Defendants object to this request because it seeks to require the
16 disclosure of information in the possession, custody, or control of entities other than
17 HHS Defendants, Fed. R. Civ. P. 34, or seeks information that can and should be
18 sought from another entity. As noted above, the Zero Tolerance Policy refers to a
19 policy initiative announced by the Department of Justice in conjunction with the
20 Department of Homeland Security; this is not a policy directive of HHS Defendants.
21 To the extent that this request appears to seek information from DHS, HHS
22 Defendants direct Plaintiffs to DHS Defendants who can provide responses and
23 objections to requests directed to that agency. Based on these objections, HHS
24 Defendants will not produce documents responsive to this request.

25 **REQUEST FOR PRODUCTION NO. 10:**

26 All DOCUMENTS, analyses, reports, and drafts thereof supporting President
27 Trump's statement that 80 percent of migrants who are released never show up for
28 their immigration hearings and disappear into the country.

1 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 10:**

2 DOJ Defendants object to Request for Production No. 10 as overbroad because
3 it seeks documents and information that are not relevant to the claims and defenses in
4 this case. An alleged statement regarding the percentage of migrants who abscond into
5 the interior has no bearing on Plaintiffs' request for mental health screenings and
6 trauma-informed mental health treatment for class members that Plaintiffs allege is
7 necessary to assess the effect of separation on class members. *See Fed. R. Evid. 401*
8 (defining "relevance"); Fed. R. Civ. Procedure 26(b)(1). This request is overly broad
9 and unduly burdensome in that it does not provide any data parameters or limitation
10 on the request for documents. This request is not limited to information generated or
11 existing during a time period that is relevant to the Parties' claims and defenses.

12 DOJ Defendants object to this request to the extent Plaintiffs purport to require
13 the disclosure of information in the possession, custody, or control of entities other
14 than DOJ Defendants, Fed. R. Civ. P. 34, or seek information that can and should be
15 sought from another entity. Finally, DOJ Defendants also object to the request to the
16 extent that it seeks the production of deliberative and pre-decisional or otherwise
17 privileged information. Based on these objections, DOJ Defendants will not produce
18 documents for this request.

19 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 10:**

20 DHS Defendants object to Request for Production No. 10 as overbroad because
21 it seeks documents and information that are not relevant to the claims and defenses in
22 this case. An alleged statement regarding the percentage of migrants who abscond into
23 the interior has no bearing on Plaintiffs' request for mental health screenings and
24 trauma-informed mental health treatment for class members that Plaintiffs allege is
25 necessary to assess the effect of separation on class members. *See Fed. R. Evid. 401*
26 (defining "relevance"); Fed. R. Civ. P. 26(b)(1). This request is also not limited to
27 information generated or existing during a time period that is relevant to the Parties'
28 claims and defenses. DHS Defendants object to this request to the extent Plaintiffs

1 purport to require the disclosure of information in the possession, custody or control
2 of entities other than DHS Defendants and exceeds the permissible scope of discovery
3 under Fed. R. Civ. P. 34, or seek information that can and should be sought from
4 another entity. To the extent that this request appears to seek information from DOJ,
5 DHS Defendants direct Plaintiffs to DOJ Defendants who can provide responses and
6 objections to requests directed to that agency. DHS Defendants further object to
7 Plaintiff's definitions and instructions because they purport to require a government-
8 wide search for documents. Such a government-wide search would be oppressive,
9 overly burdensome and overbroad, given the claims and defenses in this matter, which
10 relate to one incident that took place in one location. Finally, DHS Defendants also
11 object to the request to the extent that it seeks the production of deliberative and pre-
12 decisional or otherwise privileged information. Based on these objections, DHS
13 Defendants will not produce documents responsive to this request.

14 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 10:**

15 HHS Defendants object to this request as overbroad because it seeks documents
16 and information that are not relevant to the claims and defenses in this case. *See*
17 generally Compl. (requesting a court order requiring Defendants to provide mental-
18 health screenings before and after reunification to assess Plaintiffs' need for
19 subsequent trauma-informed medical and mental-health services and to offer
20 appropriate trauma-informed medical and mental-health services); *see also* Fed. R.
21 Evid. 401 (defining "relevance"); Fed. R. Civ. Procedure 26(b)(1) ("Parties may
22 obtain discovery regarding any nonprivileged matter that is relevant to any party's
23 claim or defense and proportional to the needs of the case, considering the importance
24 of the issues at stake in the action, the amount in controversy, the parties' relative
25 access to relevant information, the parties' resources, the importance of the discovery
26 in resolving the issues, and whether the burden or expense of the proposed discovery
27 outweighs its likely benefit."). An alleged statement regarding the percentage of
28 migrants who abscond into the interior has no bearing on Plaintiffs' request for mental

1 health screenings and trauma-informed mental health treatment for class members that
2 Plaintiffs allege is necessary to assess the effect of the separation on class members.
3 See generally Compl., ECF No. 1. This request is also not limited to information
4 generated or existing during a time period that is relevant to the Parties' claims and
5 defenses.

6 HHS Defendants further object to Request for Production No. 10 because it
7 purports to require a government-wide search for documents. Such a government-
8 wide search would be oppressive, overly burdensome and overbroad, given the claims
9 and defenses in this matter.

10 Moreover, HHS Defendants object to this request to the extent Plaintiffs purport
11 to require the disclosure of information in the possession, custody, or control of
12 entities other than HHS Defendants, Fed. R. Civ. P. 34, or seek information that can
13 and should be sought from another entity. HHS Defendants object to this request to
14 the extent it seeks documents and information for which HHS Defendants lack a basis
15 for response, as it seeks documents considered by a non-HHS entity. To the extent that
16 this request appears to seek information from DOJ or DHS, HHS Defendants direct
17 Plaintiffs to DOJ and DHS Defendants who can provide responses and objections to
18 requests directed to those agencies. Based on these objections, HHS Defendants will
19 not be producing documents responsive to this request.

20 **REQUEST FOR PRODUCTION NO. 11:**

21 All DOCUMENTS related to the testimony Commander Jonathan White,
22 Deputy Director for Children's Programs of the Office of Refugee Resettlement,
23 before the Senate Judiciary Committee on or about July 31, 2018, including but not
24 limited to documents used in or reflecting Commander White's preparation for that
25 testimony and documents related to his testimony that concerns were raised during the
26 deliberative process about the potential harm to children resulting from family
27 separation.

1 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 11:**

2 DOJ Defendants also object to the request to the extent that it seeks the
3 production of deliberative and pre-decisional or otherwise privileged information.
4 DOJ Defendants object to this request to the extent Plaintiffs purport to require the
5 disclosure of information in the possession, custody or control of entities other than
6 DOJ Defendants, Fed. R. Civ. P. 34, or seek information that can and should be
7 sought from another entity. Defendant DOJ refers Plaintiffs to HHS Defendants. To
8 the extent that this request appears to seek information from HHS, DOJ Defendants
9 direct Plaintiffs to HHS Defendants who can provide responses and objections to
10 requests directed to that agency. *See* HHS Response to RFP No. 11. Accordingly, DOJ
11 Defendants do not have any responsive documents.

12 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 11:**

13 DHS Defendants object to this request to the extent Plaintiffs purport to require
14 the disclosure of information in the possession, custody or control of entities other
15 than DHS Defendants and exceeds the permissible scope of discovery under Fed. R.
16 Civ. P. 34, or seek information that can and should be sought from another entity. As
17 noted in the Request No. 11, Commander Jonathan White is an employee of the
18 Department of Health and Human Services and thus, he is not employed by the
19 Department of Homeland Security. To the extent that this request appears to seek
20 information from HHS, DHS Defendants direct Plaintiffs to HHS Defendants who can
21 provide responses and objections to requests directed to that agency. *See* HHS
22 Response to RFP No. 11. Accordingly, DHS Defendants do not have any responsive
23 documents.

24 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 11:**

25 HHS Defendants object to this request as ambiguous, as it fails to identify a
26 specific statement or representation by Commander White before the Senate Judiciary
27 Committee for which related documents are sought.

28 HHS Defendants object to Request for Production No. 11 as overbroad because

1 it seeks documents and information that are not relevant to the claims and defenses in
2 this case. *See generally* Compl. (requesting a court order requiring Defendants to
3 provide mental-health screenings before and after reunification to assess Plaintiffs'
4 need for subsequent trauma-informed medical and mental-health services and to offer
5 appropriate trauma-informed medical and mental-health services); *see also* Fed. R.
6 Evid. 401 (defining "relevance"); Fed. R. Civ. Procedure 26(b)(1) ("Parties may
7 obtain discovery regarding any nonprivileged matter that is relevant to any party's
8 claim or defense and proportional to the needs of the case, considering the importance
9 of the issues at stake in the action, the amount in controversy, the parties' relative
10 access to relevant information, the parties' resources, the importance of the discovery
11 in resolving the issues, and whether the burden or expense of the proposed discovery
12 outweighs its likely benefit."). To the extent that Plaintiffs request documents used to
13 prepare for or relating to Commander White's testimony before the Senate Judiciary
14 Committee on July 31, 2018, this request is not limited to documents or information
15 relevant to Plaintiffs' request for mental health screenings and trauma-informed
16 mental health treatment.

17 Notwithstanding the general and specific objections, and without waiving any
18 objections, HHS will produce any non-privileged, responsive documents on a rolling
19 basis after the Court enters an appropriate protective order.

20 **REQUEST FOR PRODUCTION NO. 12:**

21 All DOCUMENTS relating to any health examination of any PUTATIVE
22 CLASS MEMBERS or their children while in government custody.

23 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 12:**

24 DOJ Defendants also object to the request to the extent that it seeks the
25 production of deliberative and pre-decisional or otherwise privileged information.
26 DOJ Defendants object to this request to the extent Plaintiffs purport to require the
27 disclosure of information in the possession, custody, or control of entities other than
28 DOJ Defendants, Fed. R. Civ. P. 34, or seek information that can and should be

1 sought from another entity. To the extent that this request appears to seek information
2 from DHS and HHS, DOJ Defendants direct Plaintiffs to DHS and HHS Defendants
3 who can provide responses and objections to requests directed to those agencies. *See*
4 DHS and HHS Responses to RFP No. 12. Accordingly, DOJ Defendants do not have
5 any responsive documents.

6 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 12:**

7 DHS Defendants object to this request as Plaintiffs' definition of "putative class
8 members" is overly broad and is not consistent with the Court's definition of the class
9 certified in its November 5, 2019 Order. In addition, this request is overly broad and
10 unduly burdensome in that it does not provide any data parameters or limitation on the
11 request for documents. This request is not limited to information generated or existing
12 during a time period that is relevant to the Parties' claims and defenses. DHS
13 Defendants object to this request to the extent Plaintiffs purport to require the
14 disclosure of information in the possession, custody or control of entities other than
15 DHS Defendants, Fed. R. Civ. P. 34, or seek information that can and should be
16 sought from another entity. To the extent that this request also appears to seek
17 information from HHS, DHS Defendants direct Plaintiffs to HHS Defendants who can
18 provide responses and objections to requests directed to that agency. *See* HHS
19 Response to RFP No. 12. DHS Defendants further object to Plaintiffs' definitions and
20 instructions because they purport to require a government-wide search for documents.
21 Such a government-wide search would be oppressive, overly burdensome and
22 overbroad, given the claims and defenses in this matter.

23 Defendant DHS refers Plaintiffs to ICE and CBP. Defendants ICE and CBP
24 object to the production of records for every class member, but rather Defendants
25 propose that Plaintiffs select a sample number of class-member health information,
26 rather than seeking discovery into every member of the class. In addition, to the extent
27 that Defendants are producing documents responsive to this request, we anticipate
28 producing any responsive electronically stored information pursuant to an ESI

1 protocol, once that protocol is in place. To the extent that DHS Defendants (through
2 ICE and CBP) have responsive non-privileged information, a signed waiver from the
3 individual who is the subject of the record is provided, or in the case of a child a
4 signed waiver from his or her parent or legal guardian, and consistent with the terms
5 of a protective order to be entered in this case, Defendant DHS (through Defendants
6 ICE and CBP) will produce such documents. Defendants ICE and CBP will not
7 release any medical or mental health records of a certified class member or their child,
8 absent a signed waiver from the certified class member (or in the case of a child their
9 legal guardian) indicating that they consent to disclosure of their record. Subject to
10 and without waiving the foregoing objections, Defendants ICE and CBP will produce
11 the medical records of the Named Plaintiffs identified in the Plaintiffs' complaint,
12 provided that a protective order is in place.

13 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 12:**

14 HHS Defendants object to this request as Plaintiffs' definition of "putative class
15 members" is overly broad and is not consistent with the Court's definition of the class
16 certified in its November 5, 2019 Order. This request is overly broad and unduly
17 burdensome in that it does not provide any data parameters or limitation on the request
18 for documents.

19 HHS Defendants also object to this request on the basis that it is overly broad,
20 unduly burdensome, and not proportional to the needs of this case in that it seeks "all"
21 documents relating to medical services pertaining to putative class members and their
22 children regardless of whether those medical services pertain to mental health
23 treatment and screening, which is the subject of this lawsuit.

24 Further, to compile "all" documents relating to "any health examination" as to
25 each child of a class member is an unnecessary burden on HHS. Compliance with
26 such a request would be very expensive and extremely burdensome. HHS would have
27 to search and collect health documents for thousands of children of class members in
28 over one hundred care providers' facilities across the country. HHS would have to

1 deploy hundreds of ORR staff resulting in considerable hardship to ORR's core
2 functions and its ability to care for the unaccompanied alien children presently in its
3 custody.

4 To the extent that ORR has responsive non-privileged information, subject to
5 and without waiving the foregoing objections, ORR will produce the medical records
6 of the Named Plaintiffs' children identified in the Plaintiffs' complaint, provided that
7 a protective order is in place. For the health information of the thousands of children
8 of class members, HHS Defendants propose that Plaintiffs select a statistical sampling
9 number of children of class-members whose health information they would like to
10 obtain, rather than seeking a burdensome discovery of health information for all of the
11 children of class members.

12 In addition, ORR will not release any medical or mental health records of a
13 child of a class member absent a signed waiver from the child's legal guardian,
14 consenting to the disclosure. If a signed waiver from the child's legal guardian is
15 provided, and consistent with the terms of a protective order to be entered in this case,
16 Defendant HHS (through Defendant ORR) will produce the health information for the
17 list of children identified by Plaintiffs. *See also* DHS Response to RFP No. 12.

18 **REQUEST FOR PRODUCTION NO. 13:**

19 All DOCUMENTS relating to the mental health of PUTATIVE CLASS
20 MEMBERS or their children, including but not limited to DOCUMENTS relating to
21 mental health screenings, evaluations, treatments, or diagnoses.

22 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 13:**

23 DOJ Defendants also object to the request to the extent that it seeks the
24 production of deliberative and pre-decisional or otherwise privileged information.
25 DOJ Defendants object to this request to the extent Plaintiffs purport to require the
26 disclosure of information in the possession, custody, or control of entities other than
27 DOJ Defendants, Fed. R. Civ. P. 34, or seek information that can and should be
28 sought from another entity. To the extent that this request appears to seek information

1 from DHS and HHS, DOJ Defendants direct Plaintiffs to DHS and HHS Defendants
2 who can provide responses and objections to requests directed to those agencies. *See*
3 DHS and HHS Responses to RFP No. 13. Accordingly, DOJ Defendants do not have
4 any responsive documents.

5 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 13:**

6 DHS Defendants object to this request as Plaintiffs' definition of "putative class
7 members" is overly broad and is not consistent with the Court's definition of the class
8 certified in its November 5, 2019 Order. This request is overly broad and unduly
9 burdensome in that it does not provide any data parameters or limitation on the request
10 for documents. This request is not limited to information generated or existing during
11 a time period that is relevant to the Parties' claims and defenses. DHS Defendants
12 object to this request to the extent Plaintiffs purport to require the disclosure of
13 information in the possession, custody or control of entities other than DHS
14 Defendants and exceeds the permissible scope of discovery under Fed. R. Civ. P. 34,
15 or seek information that can and should be sought from another entity. To the extent
16 that this request also appears to seek information from HHS, DHS Defendants direct
17 Plaintiffs to HHS Defendants who can provide responses and objections to requests
18 directed to that agency. *See* HHS Response to RFP No. 13. DHS Defendants further
19 objects to this request as it appears to require a government-wide search for
20 documents. Such a government-wide search would be oppressive, overly burdensome
21 and overbroad, given the claims and defenses in this matter, which relate to one
22 incident that took place in one location.

23 Defendant DHS refers Plaintiffs to Defendants ICE, CBP and HHS for
24 response. Defendants ICE and CBP object to the production of records for every class
25 member, but rather Defendants propose that Plaintiffs select a sample number of
26 class-member health information, rather than seeking discovery into every member of
27 the class.

28 To the extent that DHS Defendants (through ICE and CBP) have responsive

1 non-privileged information, a signed waiver from the individual who is the subject of
2 the record is provided, or in the case of a child a signed waiver from his or her parent
3 or legal guardian, and consistent with the terms of a protective order to be entered in
4 this case, DHS Defendants will produce such documents.

5 Subject to and without waiving the foregoing objections, Defendants ICE and
6 CBP will produce the medical records of the named plaintiffs identified in the
7 Plaintiffs' complaint, provided that a protective order is in place. In addition, to the
8 extent that Defendants are producing documents responsive to this request, we
9 anticipate producing any responsive electronically stored information pursuant to an
10 ESI protocol, once that protocol is in place. Defendants ICE and CBP will not release
11 any medical or mental health records of a certified class member or their child, absent
12 a signed waiver from the certified class member (or in the case of a child their parent
13 or legal guardian) indicating that they consent to disclosure of their records.

14 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 13:**

15 HHS Defendants object to this request as Plaintiffs' definition of "putative class
16 members" is overly broad and is not consistent with the Court's definition of the class
17 certified in its November 5, 2019 Order. This request is overly broad and unduly
18 burdensome in that it does not provide any data parameters or limitations on the
19 request for documents.

20 HHS Defendants object to this request because it is not proportionate to the
21 needs of this case. The class is broadly defined and includes several thousand class
22 members. To compile "all" documents relating to "any health examination" as to each
23 child of a class member is an unnecessary burden on HHS as compliance would be
24 very expensive and extremely burdensome. HHS would have to search and collect
25 health documents for thousands of children of class members in over one hundred care
26 providers' facilities across the country. HHS would have to deploy hundreds of ORR
27 staff resulting in considerable hardship to ORR's core functions and its ability to care
28 for the unaccompanied alien children presently in its custody.

1 To the extent that ORR has responsive non-privileged information, subject to
2 and without waiving the foregoing objections, ORR will produce the medical records
3 of the Named Plaintiffs' children identified in the Plaintiffs' complaint, provided that
4 a protective order is in place. For the health information of the thousands of children
5 of class members, HHS Defendants propose that Plaintiffs select a statistical sampling
6 number of children of class-members whose health information they would like to
7 obtain, rather than seeking a burdensome discovery of health information for all of the
8 children of class members.

9 In addition, ORR will not release any medical or mental health records of a
10 child of a class member, absent a signed waiver from the child's legal guardian,
11 consenting to the disclosure. If a signed waiver from the child's legal guardian is
12 provided, and consistent with the terms of a protective order to be entered in this case,
13 Defendant HHS (through Defendant ORR) will produce the health information for the
14 list of children identified by Plaintiffs. *See also* DHS Response to RFP No. 13.

15 **REQUEST FOR PRODUCTION NO. 14:**

16 All DOCUMENTS reflecting any policy, manual, procedure, training material,
17 or other similar document, applicable to or relating to the government's provision of
18 medical services to PUTATIVE CLASS MEMBERS and their children.

19 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 14:**

20 DOJ Defendants also object to the request to the extent that it seeks the
21 production of deliberative and pre-decisional or otherwise privileged information.
22 DOJ Defendants object to this request to the extent Plaintiffs purport to require the
23 disclosure of information in the possession, custody, or control of entities other than
24 DOJ Defendants, Fed. R. Civ. P. 34, or seek information that can and should be
25 sought from another entity. To the extent that this request appears to seek information
26 from DHS and HHS, DOJ Defendants direct Plaintiffs to DHS and HHS Defendants
27 who can provide responses and objections to requests directed to those agencies. *See*
28 DHS and HHS Responses to RFP No. 14. Accordingly, DOJ Defendants do not have

1 any responsive documents.

2 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 14:**

3 DHS Defendants object to this request as Plaintiffs' definition of "putative class
4 members" is overly broad and is not consistent with the Court's definition of the class
5 certified in its November 5, 2019 Order. This request is overly broad and unduly
6 burdensome in that it does not provide any data parameters or limitation on the request
7 for documents. This request is not limited to information generated or existing during
8 a time period that is relevant to the Parties' claims and defenses. DHS Defendants
9 object to this request to the extent Plaintiffs purport to require the disclosure of
10 information in the possession, custody or control of entities other than DHS
11 Defendants and exceeds the permissible scope of discovery under Fed. R. Civ. P. 34,
12 or seek information that can and should be sought from another entity. To the extent
13 that this request also appears to seek information from HHS, DHS Defendants direct
14 Plaintiffs to HHS Defendants who can provide responses and objections to requests
15 directed to that agency. *See* HHS Response to RFP No. 14.

16 DHS Defendants further object to Plaintiffs' definitions and instructions
17 because they purport to require a government-wide search for documents. Such a
18 government-wide search would be oppressive, overly burdensome and overbroad,
19 given the claims and defenses in this matter, which relate to one incident that took
20 place in one location. DHS Defendants also object to this request on the basis that it is
21 overly broad, unduly burdensome, and not proportional to the needs of this case in
22 that it seeks "all" documents relating to medical services pertaining to putative class
23 members and their children regardless of whether those medical services pertain to
24 mental health treatment and screening, which is the subject of this lawsuit. Finally,
25 DHS Defendants also object to the request to the extent that it seeks the production of
26 deliberative and pre-decisional or otherwise privileged information. Subject to and
27 without waiving the foregoing objections, Defendant CBP directs Plaintiffs to the
28 publicly available policy entitled CBP National Standards on Transport, Escort,

1 Detention, and Search (TEDS), available at

2 <https://www.cbp.gov/sites/default/files/assets/documents/2017->

3 [Sep/CBP%20TEDS%20Policy%20Oct2015.pdf](#), which concerns CBP's provision of
4 medical services for CBP detainees. Subject to and without waiving the foregoing
5 objections, ICE directs plaintiffs to the publicly available documents, such as section
6 4.3 of ICE's Performance-Based National Detention Standards, available at:

7 <https://www.ice.gov/detention-standards/2011>, which concerns medical and mental
8 health care for ICE detainees.

9 Notwithstanding the foregoing objections, once a protective order is entered by
10 the Court, DHS Defendants will produce non-privileged documents responsive to RFP
11 No. 14. In addition, to the extent that Defendants are producing documents responsive
12 to this request, Defendants anticipate producing any responsive electronically stored
13 information pursuant to an ESI protocol, once that protocol is in place.

14 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 14:**

15 HHS Defendants object to this request as Plaintiffs' definition of "putative class
16 members" is overly broad and is not consistent with the Court's definition of the class
17 certified in its November 5, 2019 Order. This request is overly broad and unduly
18 burdensome in that it does not provide any data parameters or limitations on the
19 request for documents. HHS Defendants object to this request to the extent Plaintiffs
20 purport to require the disclosure of information in the possession, custody or control
21 of entities other than HHS Defendants, Fed. R. Civ. P. 34, or seek information that can
22 and should be sought from another entity. To the extent that these requests appear to
23 seek information from DHS, HHS Defendants direct Plaintiffs to DHS Defendants
24 who can provide responses and objections to requests directed to that agency. *See*
25 DHS Response to RFP No. 14.

26 Further, this request is not limited to information generated or existing during a
27 time period that is relevant to the Parties' claims and defenses. *See generally* Compl.
28 (requesting a court order requiring Defendants to provide mental-health screenings

1 before and after reunification to assess Plaintiffs' need for subsequent trauma-
2 informed medical and mental-health services and to offer appropriate trauma-
3 informed medical and mental-health services); *see also* Fed. R. Evid. 401 (defining
4 "relevance"); Fed. R. Civ. Procedure 26(b)(1) ("Parties may obtain discovery
5 regarding any nonprivileged matter that is relevant to any party's claim or defense and
6 proportional to the needs of the case, considering the importance of the issues at stake
7 in the action, the amount in controversy, the parties' relative access to relevant
8 information, the parties' resources, the importance of the discovery in resolving the
9 issues, and whether the burden or expense of the proposed discovery outweighs its
10 likely benefit.").

11 Notwithstanding the general and specific objections, and without waiving any
12 objections, HHS will produce copies of any policy, manual, procedure, or training
13 material relating to medical services provided to UACs in its custody. HHS will
14 produce the responsive documents on a rolling basis once a protective order is in
15 place.

16 **REQUEST FOR PRODUCTION NO. 15:**

17 All DOCUMENTS relating to or similar to the Inmate Health Message Slip that
18 You submitted in this litigation (D.E. 138), including but not limited to
19 communications regarding the Inmate Health Message Slip or similar documents.

20 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 15:**

21 DOJ Defendants also object to the request to the extent that it seeks the
22 production of deliberative and pre-decisional or otherwise privileged information.
23 DOJ Defendants object to this request to the extent Plaintiffs purport to require the
24 disclosure of information in the possession, custody, or control of entities other than
25 DOJ Defendants, Fed. R. Civ. P. 34, or seek information that can and should be
26 sought from another entity. Accordingly, DOJ Defendants do not have any responsive
27 documents. Defendant DOJ refers Plaintiffs to DHS and HHS Defendants. To the
28 extent that this request appears to seek information from DHS, HHS Defendants direct

1 Plaintiffs to DHS Defendants who can provide responses and objections to requests
2 directed to that agency. *See* DHS Response to RFP No. 15.

3 **DHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 15:**

4 DHS Defendants object to this request to the extent Plaintiffs purport to require
5 the disclosure of information in the possession, custody or control of entities other
6 than DHS Defendants and exceeds the permissible scope of discovery under Fed. R.
7 Civ. P. 34, or seek information that can and should be sought from another entity.
8 DHS Defendants do not have documents responsive to this request.

9 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 15:**

10 HHS Defendants object to this request to the extent Plaintiffs purport to require
11 the disclosure of information in the possession, custody, or control of entities other
12 than HHS Defendants, Fed. R. Civ. P. 34, or seek information that can and should be
13 sought from another entity. The Inmate Health Message Slip is not a HHS document.
14 To the extent that this request appears to seek information from DHS, HHS
15 Defendants direct Plaintiffs to DHS Defendants who can provide responses and
16 objections to requests directed to that agency. *See* DHS Response to RFP No. 15.
17 Based on these objections, HHS Defendants will not be producing documents
18 responsive to this request.

19 **REQUEST FOR PRODUCTION NO. 16:**

20 All DOCUMENTS YOU have produced or will produce in other litigation
21 related to the ZERO TOLERANCE SEPARATION Policy, including but not limited
22 to documents produced in *Ms. L. v. U.S. Immigration and Customs Enforcement*, No.
23 3:18-cv-00428 (S.D. Cal.) (Sabraw, J.).

24 **DOJ DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 16:**

25 DOJ Defendants object to this request as overly broad and unduly burdensome
26 and not limited in time or scope. DOJ Defendants object to this request because it is
27 vague in that it seeks documents Defendants "will produce in other litigation." DOJ
28 Defendants object to this request to the extent it seeks information regarding a "Zero

1 Tolerance Separation Policy,” which does not exist. The Zero Tolerance Policy issued
2 by then-Attorney General Sessions, dated April 6, 2018, sets forth a policy regarding
3 referrals for criminal prosecution under 8 U.S.C. § 1325(a). On May 11, 2018, then-
4 Secretary Nielsen issued a memorandum directing “all DHS law enforcement officers
5 at the border to refer all illegal border crossers to the Department of Justice for
6 criminal prosecution to the extent practicable.” DOJ Defendants object to Request for
7 Production No. 16 as overbroad because it seeks documents and information that are
8 not relevant to the claims and defenses in this case. *See Fed. R. Evid. 401* (defining
9 “relevance”); *Fed. R. Civ. Procedure 26(b)(1)*. DOJ Defendants also object to this
10 request to the extent that it seeks to obtain information protected from disclosure by
11 protective orders entered in other litigation. Accordingly, DOJ Defendants will not
12 produce documents for this request.

13 **DHS DEFENDANTS’ SUPPLEMENTAL RESPONSE TO RFP 16:**

14 DHS Defendants object to this request as overly broad and unduly burdensome
15 and not limited in time or scope. DHS Defendants object to this request to the extent it
16 seeks information regarding a “Zero Tolerance Separation Policy,” which does not
17 exist. The Zero Tolerance Policy issued by then-Attorney General Sessions, dated
18 April 6, 2018, sets forth a policy regarding referrals for criminal prosecution under 8
19 U.S.C. § 1325(a). On May 11, 2018, then-Secretary Nielsen issued a memorandum
20 directing “all DHS law enforcement officers at the border to refer all illegal border
21 crossers to the Department of Justice for criminal prosecution to the extent
22 practicable.” This request is overly broad and unduly burdensome in that it does not
23 provide any data parameters or limitation on the request for documents. This request is
24 not limited to information generated or existing during a time period that is relevant to
25 the Parties’ claims and defenses. DHS Defendants object to this request to the extent
26 that it seeks to obtain information protected from disclosure by protective orders
27 entered in other litigation. It would be unduly burdensome and expensive to comply
28 with this extremely broad request because DHS would have to collect and produce all

1 the documents produced or that the agency will produce in all cases related to the Zero
2 Tolerance Policy, regardless of whether these documents are relevant to any claims or
3 defenses in this litigation. Based on these objections, DHS Defendants will not
4 produce documents responsive to this request.

5 **HHS DEFENDANTS' SUPPLEMENTAL RESPONSE TO RFP 16:**

6 HHS objects to this request as overbroad and vague as it seeks documents that
7 Defendants "will produce in other litigation" related to the Zero Tolerance Separation
8 Policy. HHS Defendants object to this request to the extent it seeks information
9 regarding a "Zero Tolerance Separation Policy," which does not exist. The Zero
10 Tolerance Policy issued by then-Attorney General Sessions, dated April 6, 2018, sets
11 forth a policy regarding referrals for criminal prosecution under 8 U.S.C. § 1325(a).
12 On May 11, 2018, then-Secretary Nielsen issued a memorandum directing "all DHS
13 law enforcement officers at the border to refer all illegal border crossers to the
14 Department of Justice for criminal prosecution to the extent practicable."

15 This request is not limited to information generated or existing during a time
16 period that is relevant to the Parties' claims and defenses. HHS Defendants object to
17 this request to the extent that it seeks to obtain information protected from disclosure
18 by protective orders entered in other litigation.

19 HHS further objects to this request as unreasonably burdensome and not
20 proportionate to the needs of this case. HHS is litigating numerous cases in Federal
21 District Court, as well as administrative claims, pertaining to the Zero Tolerance
22 Policy. Some of these cases are handled by various United States Attorneys' Offices
23 across the country and other Divisions within the U.S. Department of Justice. It would
24 be unduly burdensome and expensive to comply with this extremely broad request
25 because HHS would have to collect and produce all the documents produced or that
26 the agency will produce in all cases related to the Zero Tolerance Policy, regardless of
27 whether these documents are relevant to any claims or defenses in this litigation.
28 Based on these objections, HHS Defendants will not be producing documents

1 responsive to this request.

2 **III. ARGUMENTS ON DISCOVERY**

3 **A. List of Putative Class Members (RFP 1)**

4 **1. Plaintiffs' Argument**

5 The Court has certified a class of Plaintiffs and entered a preliminary injunction
6 ordering Defendants to provide mental health screenings and appropriate treatment to
7 the class members. *See generally* Order. Plaintiffs must be given the names of the
8 class members and contact information to reach out to Plaintiffs and inform them of
9 their rights to these services. Plaintiffs have requested this information in RFP 1.
10 Plaintiffs cannot know how to contact putative class members or the most efficient
11 and effective way to get in contact with them, evaluate them, and provide the
12 necessary services if they do not know who or where they are.

13 Defendants have already compiled a list of a putative class members for the *Ms.*
14 *L.* litigation and produced that list to plaintiffs' counsel in that action. Given that that
15 list largely duplicates the putative class here, it would cost Defendants little to produce
16 this list to Plaintiffs. Indeed, Defendants have said that they stand ready to produce the
17 list as soon as a protective order is agreed and filed in this action; however,
18 Defendants have been slow-playing the request for a Protective Order, taking weeks to
19 respond, missing their own deadlines to respond, and failing to meet and confer on
20 that Protective Order. *See* Fee Decl. Exs. I, J, K (correspondence with Defendants).

21 Plaintiffs ask for the Court's assistance in obtaining a list of class members
22 from the Defendants to be able to administer mental health screenings and treatment
23 as soon as possible to comply with the Order.

24 Plaintiffs are also filing a request for an Informal Conference on the Protective
25 Order which will hopefully allow this Court to step in, stop the delays, and allow the
26 parties to start implementing the Court's Preliminary Injunction.

27 **2. Defendants' Argument**

28 Plaintiffs' assertion that the government can simply reproduce the class list

1 from *Ms. L.*, and should do so without a protective order in place, is unavailing. First,
2 while it is correct that the Court has certified a class of Plaintiffs in this case that is
3 similar to the class certified in *Ms. L.*, it is inaccurate that the classes duplicate each
4 other such that Defendants can produce a list from that case and comply with their
5 production obligations in this case. In *Ms. L.*, the court certified the following
6 expanded class:

7 All adult parents who entered the United States at or between
8 designated ports of entry on or after July 1, 2017, who (1) have been,
9 are, or will be detained in immigration custody by the DHS, and (2)
10 have a minor child who has been, is or will be separated from them by
11 DHS and has been, is or will be detained in ORR custody, ORR foster
12 care, or DHS custody, ***absent a determination*** that the parent is unfit or
presents a danger to the child.

13 Order Granting Plaintiffs' Motion to Modify Class Definition, ECF No. 386 at 13-14,
14 *Ms. L. v. U.S. Immigration and Customs Enforcement*, No. 3:18-cv-00428 (S.D. Cal.)
15 (emphasis added).

16 Here, the Court certified the following class:
17

18 All adult parents nationwide who entered the United States at or
19 between designated ports of entry, who (1) on or after July 1, 2017,
20 were, are, or will be detained in immigration custody by DHS; and (2)
21 have a minor child who has been, is, or will be separated from them by
22 DHS and detained in DHS or Office of Refugee Resettlement custody
or foster care, ***absent a demonstration in a hearing*** that the parent is
unfit or presents a danger to the child.

23 Order at 29 (emphasis added). As reflected by the emphasized language from each
24 certified class above, the class certified here is different than the class certified in *Ms.*
L. The creation of the class list in this case requires a manual review of the exclusions
25 from the *Ms. L.* class to determine who was separated on the basis of parental fitness
26 or danger presented to a child—because *Ms. L.* does not require that the determination
27
28

1 of fitness or danger be done in a hearing. Therefore, it is not possible to simply
2 produce the *Ms. L.* class list in this case.

3 Second, and more importantly, Defendants remain ready to produce a class list
4 once a protective order is in place. Defendants have explained this to Plaintiffs'
5 counsel. And, as demonstrated by the parties' email correspondence, Defendants have
6 actively engaged in meet and confers on the instant motion and have similarly actively
7 worked with Plaintiffs to finalize a protective order and clawback agreement.
8 Plaintiffs' own exhibits to this motion show that Defendants have diligently worked
9 with them to exchange edits on the draft protective order and clawback agreement and
10 resolve any disputes. *See* Fee Decl. Exs. I, J, K, P. Additional correspondence not
11 included in Plaintiffs' exhibits contradicts Plaintiffs' allegation that Defendants have
12 been "slow-playing the request for a Protective Order, taking weeks to respond." *See*
13 Vick Decl. Exs. 1, 2, 3. Instead, the correspondence demonstrates that Defendants
14 have remained in regular contact with Plaintiffs, have provided updates on their
15 progress when they have been unable to provide drafts at a given time, and agreed to
16 engage in an Informal Conference to resolve remaining disputes with respect to the
17 proposed protective order and clawback agreement. *See id.* At no point have "weeks"
18 passed where Defendants have not been in contact with Plaintiffs over these matters.
19 Accordingly, the Court should deny Plaintiffs' request that Defendants produce a class
20 list from *Ms. L.*, as well as Plaintiffs' request that Defendants produce any list prior to
21 the entry of a protective order.

22 **B. Documents Relating to the Zero Tolerance Separation Policy (RFPs**
23 **2, 3, 4, 5, 6, 7, 8, 9, and 16)**

24 **1. Plaintiffs' Argument**

25 Documents relating to Defendants' decision to adopt the Zero Tolerance
26 Separation Policy, also known as the Family Separation Policy—the policy and
27 practice of separating parents from their children without a showing that the parents
28 are unfit, and then holding the parents and children each in separate detention with no

1 access to one another—and consideration of alternatives (such as the Family Case
2 Management Program) are directly relevant to whether Defendants violated Plaintiffs'
3 due process rights and guarantee of equal protection under the Constitution. These
4 claims are laid forth in Plaintiffs' Complaint. Fee Decl. Ex. H (Complaint) ¶¶ 74-104,
5 First and Second Claim for Relief. Plaintiffs are entitled to discovery that will allow
6 them to show that the Zero Tolerance Separation Policy was implemented for
7 improper reasons and that Defendants were well aware of the extreme and
8 unconstitutional danger they would be placing Plaintiffs and their minor children in
9 and that Defendants ignored that knowledge for their own political ends. *Id.*; Fed. R.
10 Civ. P. 26(b)(1).

11 Indeed, the Court summarized – and denied – Defendants' motion to dismiss
12 noting that "Plaintiffs have adequately stated a claim that the family separation policy,
13 in combination with the insufficient mental healthcare provided during detention,
14 violated their due process rights." Order at 47. Having stated a claim sufficient to
15 survive Defendants' motion to dismiss (and with sufficient likelihood of success on
16 the merits to obtain a preliminary injunction), Plaintiffs still need to prove this claim
17 at trial. Information about the Zero Tolerance Separation Policy is directly relevant to
18 that proof, and thus Plaintiffs are entitled to this discovery.

19 Part of the state-created danger doctrine involves the question of whether
20 Defendants were aware of the danger. As the Court noted "Plaintiffs also presented
21 evidence that Defendants were aware of the risks associated with the family separation
22 when they implemented it. Indeed, Attorney General Sessions stated that the purpose
23 of the policy was to deter foreign nationals from entering the United States illegally."
24 Order at 40-41 (*citing Hernandez v. City of San Jose*, 897 F.3d 1125, 1137 (9th Cir.
25 2018); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006)). Thus,
26 Defendants' repeated objection that the "how or why" of the instantiation and
27 implementation of the Zero Tolerance Separation Policy is irrelevant does not have
28 any merit. Plaintiffs need to know how and why the policy was crafted in order to

1 show that the Defendants were aware of the risks and willfully disregarded the risks
2 for their own political purposes or due to racial animus.

3 Plaintiffs are entitled to information about how and why the Zero Tolerance
4 Separation Policy was implemented as the information requested bears on whether
5 Plaintiffs were arbitrarily separated from their children without fair proceedings or
6 adequate consideration of their rights. Responsive documents will also illuminate
7 whether Defendants' actions were motivated by racial animus, white nationalism, or
8 xenophobia in violation of Equal Protection and Due Process clauses. *See* Complaint
9 ¶¶ 87-95. Animus on the part of the Government is directly relevant to Plaintiffs'
10 claims – establishing intent and deliberate indifference – and would further support
11 the necessity of intervention by the Courts to block the continued and deliberate
12 violation of Plaintiffs' due process and equal protection rights based on their color and
13 national origin. *See Order at 36 (citing Gordon v. Cty. of Orange, 888 F.3d 1118,*
14 *1124-25 (9th Cir. 2018)).* The reasons behind the Zero Tolerance Separation Policy are
15 central issues in Plaintiffs' due process and equal protection claims.

16 Defendants' Objections state that Plaintiffs' discovery should be limited to
17 information about seeking mental health screenings and not to the how or why of the
18 Zero Tolerance Separation Policy behind them. *See* DHS Response to RFP 2, *supra*,
19 ("Specifically, the how or why of the alleged policy has no bearing on Plaintiffs'
20 request for mental health screenings and trauma-informed mental health treatment for
21 class members that Plaintiffs allege is necessary to assess the effect of separation on
22 class members.").¹¹ This objection fundamentally misstates Rule 26. Plaintiffs are
23 entitled to discovery on any party's *claims* and *defenses* (*i.e.* Plaintiffs' claims of
24 constitutional violation by Defendants) not just on the *remedy* sought by Plaintiffs (*i.e.*
25 the mental health screenings and trauma-informed treatment necessary to remedy the
26 constitutional violation). Fed. R. Civ. P. Rule 26(b)(1).

27 ¹¹ Similar claims are made in the DOJ Defendants' responses to RFPs 2, 3, 4, 5, 9, 10,
28 the DHS Defendants' responses to RFPs 2, 3, 4, 5, 6, 7, 9, 10; the HHS
Defendants' responses to RFPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 14.

1 Defendants argued in meet and confer that the Zero Tolerance Separation
2 Policy is the *Ms. L.* case and that this is a separate case as found by the Court in
3 adjudicating the first-to-file rule (Order at 12-15) and that therefore any discovery into
4 the Zero Tolerance Separation Policy is irrelevant. This argument misconstrues the
5 Court's holding and the meaning of relevance under Rule 26. The Court found that
6 there is "a relationship between the constitutional rights asserted by the members of"
7 the *Ms. L.* class and the class here. Order at 14. While the relief sought is different,
8 justifying keeping the cases separate, the Zero Tolerance Separation Policy is relevant
9 to both as the Court made clear in analyzing that policy in determining whether
10 Plaintiffs were likely to succeed on the merits of their claim. *See* Order at 37 ("This
11 includes a likelihood of success as to whether Defendants were deliberately indifferent
12 to the mental health risks presented by the family separation policy and did not take
13 reasonable steps to avoid or address them") (citations omitted); *Id.* at 40-41 (state-
14 created danger doctrine).

15 Here the Court has made plain in its Order for Preliminary Injunction that
16 Defendants' indifference and lack of steps to prevent severe trauma to Plaintiffs and
17 their minor children are relevant to Plaintiffs' claims. Defendants' arguments to the
18 contrary are unavailing and, in fact, seem obstructive in light of the Court's holdings.

19 Also, the Court's Order addresses any burden arguments that Defendants might
20 make under Rule 26. *See* Order at 44-45. The Court found that the "the costs to the
21 Government [of a Preliminary Injunction] will be the result of its actions and the
22 resulting claimed adverse effects on Plaintiffs." Order at 44 (citations omitted). A
23 similar argument holds true for discovery, particularly here where the Department of
24 Justice serves as counsel for all of the various agencies and can thus identify where
25 responsive documents are held far better than can Plaintiffs. Here, Plaintiffs' requests
26 are narrowly tailored to their claims and Defendants' defenses. The Government has
27 access to the information and Plaintiffs do not. The issues at stake are sufficiently
28 weighty to have merited entry of a Preliminary Injunction in the public interest. With

1 regards to the issues at stake in the action, in finding that the preliminary injunction
2 was in the public interest, the Court reviewed and rejected Defendants' arguments
3 about the burden it would place on them, noting that it is "always in the public interest
4 to prevent the violation of a party's constitutional rights." Order at 44 (*citing*
5 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation omitted)). In
6 short, all of the factors of Rule 26 point in favor of ordering the Government to
7 produce this relevant information.

8 **2. Defendants' Argument**

9 Plaintiffs' claim that Defendants' decision to adopt the Zero Tolerance Policy is
10 relevant to their claims and defenses in this case is without merit. Documents relating
11 to the Zero Tolerance Policy, and the consideration of any alternative policies
12 including the Family Case Management Program, are not relevant to Plaintiffs' claims
13 concerning the alleged mental trauma they experienced as a result of separation and
14 the alleged failure of the government to provide mental health screenings and
15 treatment sufficient to address the alleged trauma. Fee Decl. Ex. H ¶¶ 87-95, 178-81,
16 183-85. Further, according to this Court's Order, the constitutionality of the Zero
17 Tolerance Policy is the key legal issue in *Ms. L.*, but it is not the key legal issue in this
18 case. Order at 13-14. Thus, the Court should deny Plaintiffs' requests as irrelevant.

19 Federal Rule of Civil Procedure 26(b) provides that parties may obtain
20 discovery regarding: any nonprivileged matter that is relevant to any party's claim or
21 defense and proportional to the needs of the case, considering the importance of the
22 issues at stake in the action, the amount in controversy, the parties' relative access to
23 relevant information, the parties' resources, the importance of the discovery in
24 resolving the issues, and whether the burden or expense of the proposed discovery
25 outweighs its likely benefit.

26 Discovery may be denied where: "(i) the discovery sought is unreasonably
27 cumulative or duplicative, or can be obtained from some other source that is more
28 convenient, less burdensome, or less expensive; (ii) the party seeking discovery has

had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C). "Accordingly, the right to discovery, even plainly relevant discovery, is not limitless." *Muhammad v. California*, No. CV 18-4017 JAK (SS), 2019 WL 6315536, at *8–9 (C.D. Cal. Sept. 19, 2019). "District courts have broad discretion in determining relevancy for discovery purposes." *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005).

Discovery requests seeking information about the decision to adopt the Zero Tolerance Policy, to include its creation and reasons for adoption, is not relevant—even for discovery purposes—to the Plaintiffs' claims and defenses in this case. Simply put, the reasons why the government adopted the policy do not inform the analysis of whether the alleged policy was implemented without consideration of the consequences of the implementation and the resulting alleged insufficiency of mental health care provided in light of the Zero Tolerance Policy. Nor does it inform whether Defendants had a duty to provide mental health care. Plaintiffs correctly note that the Court said, in denying Defendants' Motion to Dismiss, "Plaintiffs have adequately stated a claim that the [Zero Tolerance Policy], *in combination with* the insufficient mental healthcare provided during detention, violated their due process rights." Order at 47 (emphasis added). However, Plaintiffs incorrectly read this statement, along with the rest of the Court's order, to mean that the constitutionality of the Zero Tolerance Policy itself is an issue in this case. It is not. The issue in this case is the alleged mental trauma Plaintiffs experienced as a result of separation and the alleged failure of the government to provide mental health screenings and treatment sufficient to address the alleged trauma.

This is not a case where the issues raised by the parties' claims and defenses substantially need to be narrowed or clarified. *See Polaris Innovations Ltd. v. Kingston Tech. Co., Inc.*, No. SACV1600300CJCRAOX, 2017 WL 2806897, at *4 (C.D. Cal. Mar. 30, 2017) (finding that liberal discovery rules are intended to help

1 define, narrow, and clarify issues) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437
2 U.S. 340, 351 (1978) and *Hickman v. Taylor*, 329 U.S. 425, 500 (1947)). Instead, the
3 parties have already briefed and argued the substantive issues in this case concerning
4 the constitutionality of Defendants' mental health care provided to detainees and the
5 duty Defendants owe to those detainees in its custody. Moreover, the parties engaged
6 in several months of good faith settlement negotiations. Plaintiffs cannot argue that
7 they require wide-ranging discovery into the creation and adoption of the Zero
8 Tolerance Policy in order to glean more information that would be relevant and
9 helpful to the claims and defenses here when the issues have been clarified
10 substantially over the course of this litigation.

11 In the Court's order granting Plaintiffs' Motion for Preliminary Injunction and
12 Class Certification and denying Defendants' Motion to Dismiss, the Court compared
13 the legal claims and issues between this case and *Ms. L.* Most notably, the Court said:

14 [T]he key legal issue presented in *Ms. L.* was whether the family
15 separation process violated the Constitution. . . . This action presents a
16 different issue. The question presented here is whether Defendants'
17 alleged failure to provide sufficient mental health and trauma services
18 to individuals separated pursuant to the policy violates the Constitution.

19 Order at 13-14. The Court further found that "the alleged common injury is not the
20 separation itself, which can be remedied through reunification [as in *Ms. L.*], but the
21 claimed psychological trauma caused by separation." Order at 20. Thus, to the extent
22 that Plaintiffs' RFPs relate to the constitutionality of the Zero Tolerance Policy, as
23 opposed to the constitutionality of the government's exercise of the policy and the
24 purportedly inadequate mental health care and trauma services provided to those who
25 were prosecuted under the policy and separated from their children as a result, those
26 RFPs are entirely irrelevant to the claims and defenses in this case.

27 The Court found that this case and *Ms. L.* arise out of the Zero Tolerance Policy
28 but that "the issues presented by the two actions are distinct," and therefore the first-
to-file rule did not apply. Order at 13. The "first-to-file" rule "is intended to serve[]

1 the purpose of promoting efficiency well and should not be disregarded lightly.” *Kohn*
2 *Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1239-40 (9th Cir.
3 2015) (internal quotations omitted). Part of the first-to-file inquiry is whether the
4 litigations at issue are duplicative, which includes whether discovery in the two
5 actions would be duplicative. *See Kelley v. HCR Manorcare, Inc.*, No. SACV 17-1259
6 JVS(JCGx), 2017 WL 10441310, at *3 (C.D. Cal. Nov. 28, 2017) (“transferring the
7 case … will serve the purpose of the first-to-file rule in promoting judicial efficiency
8 and conservation of resources. For example, the claims in *Weldon* and this action are
9 identical, and because of the identical claims, a significant portion of discovery in
10 both actions will be duplicative.”); *Tran v. Third Ave. Mgmt. LLC*, No. CV-16-602-
11 MWF (SSx), 2016 U.S. Dist. LEXIS 182577, at *20 (C.D. Cal. Apr. 12, 2016)
12 (“transfer … would serve the purpose of the first-to-file rule in promoting judicial
13 efficiency and avoiding the possibility of conflicting judgments. Due to the
14 overlapping factual allegations, a significant portion of discovery would otherwise be
15 duplicative.”). Duplicative discovery between this litigation and *Ms. L.* would be
16 inconsistent with this Court’s finding that first-to-file rule did not apply. Order at 15.
17 To the extent Plaintiffs’ RFPs in this case concern the creation and adoption of the
18 Zero Tolerance Policy, and thus the constitutionality of the policy itself, they are
19 duplicative of *Ms. L.* and not relevant.

20 Plaintiffs’ own words cut against their claims in the motion to compel. Plaintiffs
21 went to extraordinary lengths in their Reply brief filed in support of their Motion for
22 Class Certification to distinguish the issues in this case from the issues in *Ms. L.* in
23 order to overcome the first-to-file rule. *See Vick Decl. Ex. 4* (Pls.’ Reply in Support of
24 Mot. for Class Cert.). Plaintiffs argued “*Ms. L* centers only on the question of
25 ‘whether the practice of family separation . . . violates due process and warrants
26 injunctive relief’” and “While both cases involve Defendants’ family separation
27 policy, that is where their similarities stop. The issues in the cases are different.” *Id.* at
28 2-3. ECF No. 120 at 2-3; *see also* Order at 13 (noting Plaintiffs’ argument that the

1 claims related to the Zero Tolerance Policy in this case and *Ms. L* are different). Thus,
2 by Plaintiffs' own admission, the subject matter of many of their RFPs relating to the
3 adoption and purpose of the Zero Tolerance Policy are irrelevant to the claims and
4 defenses in this case.

5 Plaintiffs contend that the Court's application of the state-created danger
6 doctrine renders discovery into the creation and adoption of the Zero Tolerance Policy
7 relevant. This is not so. Whether Defendants were aware of any danger associated
8 with the policy has no bearing on whether the Plaintiffs may have suffered harm and a
9 violation of their constitutional rights as a result of the alleged lack of mental health
10 care in detention sufficient to address the alleged harm caused by the policy. Further,
11 to prove Defendants were aware of any danger to mental health related to family
12 separation does not require discovery into the creation and adoption of a policy to
13 enforce particular immigration laws.

14 Finally, Plaintiffs' attempted conflation of the three agencies named as
15 defendants in this litigation underscores Plaintiffs' attempted overreach regarding
16 discovery related to the Zero Tolerance Policy. Plaintiffs claim in their Introductory
17 Statement that "HHS Defendants have not agreed to provide any documents for 9
18 requests and have severely limited their responses to the remaining 7." This assertion
19 is inaccurate, at best. Rather, as HHS Defendants' responses and objections to the
20 RFPs make clear, the RFPs seek information that is not in HHS Defendants'
21 possession, custody, or control. HHS Defendants cannot produce what they do not
22 have. *Unilin Beheer B.V. v. NSL Trading Corp.*, No. 14-2210 BRO (SSx), 2015 WL
23 12698284, *6 (C.D. Cal. Sept. 17, 2015) ("A court cannot order a party to produce
24 documents that do not exist"); *see also Bethea v. Comcast*, 218 F.R.D. 328, 329
25 (D.D.C. 2003) (requesting party's suspicion that responding party failed to produce
26 responsive documents does not justify compelled inspection); *Hughes v. United*
27 *States*, 701 F.2d 56, 58 (7th Cir. 1982) (In litigation, "Government agencies do not
28 merge into a monolith[.]"). The Zero Tolerance Policy was an enforcement initiative

1 announced by DOJ in conjunction with DHS. It was not a policy initiative of HHS
2 Defendants. The Family Case Management Program was a DHS program. Thus, the
3 RFPs related to the Zero Tolerance Policy facially seek information HHS does not
4 have—information allegedly regarding programs of other agencies and regarding the
5 creation and adoption of a policy devised, announced, and enacted by other agencies.
6 Plaintiffs' attempts to conflate the various federal agencies it named as Defendants is
7 nothing more than a transparent attempt to paper over its failure to serve RFPs
8 relevant to this case. Accordingly, the Court should deny Plaintiffs' RFPs relating to
9 the creation and adoption of the Zero Tolerance Policy as irrelevant to the claims and
10 defenses in this case.

11 **C. Discovery into Defendants' Claims of Necessity and Prior Programs**
12 **(RFPs 6, 7, 9, 10, 11)**

13 **1. Plaintiffs' Argument**

14 Defendants have argued that the Zero Tolerance Separation Policy was
15 necessary and separating young children from their parents and keeping them
16 incommunicado for weeks was therefore not a constitutional violation. *See, e.g.* Fee
17 Decl. Ex. C (statements made by Government officials referenced in Plaintiffs' First
18 Set of Requests For Production 9, 10, and 11); Ex. M (Defendants' Opp. to Plaintiffs'
19 Preliminary Injunction Motion) at 3-7. Since they are relevant to Defendants'
20 defenses, discovery into the support for these statements is proper. Fed. R. Civ. P.
21 26(b)(1). Plaintiffs also affirmatively claim that the Zero Tolerance Separation Policy
22 was not necessary or in response to exigencies of the situation but was instead due to
23 racial animus, xenophobia, white nationalism, and a callous desire for political point-
24 making in violation of Plaintiffs' due process and equal protection rights. Complaint
25 ¶¶ 74-95. As these requests relate directly to both Plaintiffs' claims and Defendants'
26 defenses, they are squarely within the ambit of Rule 26 discovery.

27 In addition, as the Court has held, establishing that there was no necessity for
28 the Zero Tolerance Separation Policy and in fact only pretext on the part of the

1 Defendants and the Government with deliberate indifference to the rights of Plaintiffs
2 is directly relevant to proving Plaintiffs' constitutional claims. *See Order at 40-41*
3 (state-created danger doctrine).

4 In particular, Plaintiffs' requests related to the Family Case Management
5 Program are directly relevant to this case. First, the Program is part of Plaintiffs
6 argument as to why the shift to the Zero Tolerance Separation Policy was unnecessary
7 and is harmful. Complaint ¶¶ 7, 75-77. Second, this information is needed in order for
8 Plaintiffs to prove their claim that Defendants' policy of separating families was
9 unnecessary and thus a violation of Plaintiffs' due process rights. *See Order at 20*
10 (citing the *Ms. L.* class certification order and *Parsons v. Ryan*, 754 F.3d 657, 662-63
11 (9th Cir. 2014)). This discovery will also allow Plaintiffs to rebut any necessity
12 defense put forth by Defendants, as contemplated by Rule 26, which allows for
13 discovery of defenses.

14 Other suggestions of necessity of the Zero Tolerance Separation Policy made by
15 the Government such as those in RFPs 9, 10, and 11 are, for the same reasons,
16 relevant to this case and thus the proper subject of discovery under Rule 26.

17 As stated above, the issues in this case are critically important, the Government
18 has superior access to the documents, and the Court has already dispensed with
19 Defendants' burden arguments must fail in the face of the trauma caused to Plaintiffs
20 and their minor children by Defendants' unconstitutional and indifferent behavior, as
21 the Court noted in issuing its Preliminary Injunction. *See Order at 44-45; see supra* at
22 III B(1).

23 **2. Defendants' Argument**

24 In support of their argument that the Court should compel the production of
25 responses to RFP Nos. 6, 7, 9, 10, and 11, Plaintiffs claim that Defendants have put
26 forth as a defense in this case "that the Zero Tolerance Separation Policy was
27 necessary and separating young children from their parents and keeping them
28 incommunicado for weeks was therefore not a constitutional violation." Plaintiffs

1 further claim that the Court held “establishing that there was no necessity for the Zero
2 Tolerance Separation Policy and in fact only pretext on the part of the Defendants and
3 the Government with deliberate indifference to the rights of Plaintiffs is directly
4 relevant to proving Plaintiffs’ constitutional claims.” Finally, Plaintiffs request
5 documents related to the Family Case Management Program and certain statements by
6 government officials. Because Plaintiffs misrepresent Defendants’ argument with
7 respect to the consequences of the Zero Tolerance Policy, and because they have
8 failed to demonstrate the relevance of the Family Case Management Program and
9 certain statements by government officials, the Court should deny these requests.

10 First, Plaintiffs inaccurately frame Defendants’ position by claiming that
11 Defendants have argued that the Zero Tolerance Policy, and the separation of families
12 as a result of that policy, was necessary. That is not an accurate recitation of
13 Defendants’ argument or defense in this case. Throughout this litigation, it has been
14 Defendants’ position that the Zero Tolerance Policy provided for the prosecution
15 under the illegal-entry statutes, 8 U.S.C. §§ 1325 and 1326, of all adults who crossed
16 or attempted to cross the border between ports of entry regardless of whether that
17 adult is a member of a family unit. The Policy led to an increase in separations of alien
18 families because a parent who is prosecuted becomes unavailable to care for his or her
19 child, and the child therefore becomes an unaccompanied alien child who must be
20 transferred to the custody of HHS. Plaintiffs’ attempt to reframe Defendants’
21 arguments is disingenuous.

22 Moreover, with respect to Plaintiffs’ convoluted argument that “establishing
23 that there was no necessity for the Zero Tolerance Separation Policy and in fact only
24 pretext on the part of the Defendants and the Government” is relevant to proving their
25 constitutional claims, this argument lacks merit. Plaintiffs do not need to establish that
26 there was no necessity for the Zero Tolerance Policy, or that there was pretext on the
27 part of Defendants, because such a showing is not relevant to any party’s claim or
28 defense in this case. Defendants maintained throughout their objections to Plaintiffs’

1 RFPs that the purpose of the policy, as stated in the Zero Tolerance Memorandum,
2 was to respond to the “recent increase in aliens illegally crossing our Southwest
3 Border.” See U.S. Department of Justice, News Release: Attorney General Announces
4 Zero-Tolerance Policy for Criminal Illegal Entry (April 6, 2018), DOJ 18-417, 2018
5 WL 1666622, <https://www.justice.gov/opa/press-release/file/1049751/download>. The
6 Court noted in its Order Defendants’ contention that “the policy was designed to deter
7 individuals from crossing the southern border.” Order at 6. Nothing in the Court’s
8 Order identifies a “pretext” underlying the policy or discusses a “necessity” defense.
9 Thus, Plaintiffs’ argument in this respect fails.

10 Second, Plaintiffs’ RFPs related to the Family Case Management Program¹² are
11 in no way relevant to this case. Simply put, documents relating to the Family Case
12 Management Program—an entirely separate program from the Zero Tolerance Policy
13 that ended prior to the implementation of that policy—are irrelevant and have nothing
14 to do with Plaintiffs’ claims that they suffered mental distress and trauma as a result of
15 separation from their children and that Defendants have a duty to provide mental
16 health care sufficient to address such trauma. Information about a Defendant
17 agency’s¹³ prior program is likewise entirely irrelevant to Plaintiffs’ claims that they
18 received constitutionally inadequate mental health care from that Defendant agency in
19 detention. Even considering that relevancy for discovery purposes is broader than for
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21 ¹² The Family Case Management Program (FCMP) was a community-based
22 Alternative to Detention initiative designed to ensure that participants complied with
23 their immigration obligations, such as release conditions, including any required
24 reporting to ERO; immigration court hearings; final orders of removal; voluntary
departure; voluntary return, or other resolution of the participants’ cases. See U.S.
Department of Homeland Security, Immigration and Customs Enforcement, Report of
the ICE Advisory Committee on Family Residential Centers 22 (Oct. 7, 2016),
available at <https://www.ice.dhs.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>

25 ¹³ This is particularly true with regard to HHS Defendants. As noted above, Plaintiffs’
attempts to conflate the various federal agencies it named as Defendants is nothing
more than a transparent attempt to paper over its failure to serve RFPs relevant to this
case. The Family Case Management Program was a DHS program. Thus, the RFPs
related to the Family Case Management Program facially seek information HHS
Defendants do not have—information allegedly regarding prior programs of other
agencies.

1 purposes of trial, that the government may have taken an action that violated
2 Plaintiffs' constitutional rights does not establish the relevancy of discovery into other
3 hypothetical and speculative actions that the government could have taken to avoid
4 violating Plaintiffs' rights. *See Fed. R. Civ. Pro. 26(b); see In re: Am. Med. Sys., Inc.*,
5 2016 WL 3077904, at *4. Thus, Plaintiffs' RFPs concerning the Family Case
6 Management Program and the statements of certain government officials are
7 irrelevant. Accordingly, the Court should deny Plaintiffs' RFP Nos. 6, 7, 9, 10, and
8 11.

9 **D. Time Period for Discovery**

10 **1. Plaintiffs' Argument**

11 Defendants have objected to the time period in the RFPs, and have said that
12 they will produce responsive documents from July 1, 2017 to January 10, 2019. *See*
13 Fee Decl. Exs. D, E, F (Defendants' Responses) at 2. Plaintiffs believe that
14 Defendants should produce responsive documents starting January 20, 2017. *See* Fee
15 Decl. Ex. C (Document Requests) at 3.

16 In the meet and confer process Plaintiffs made clear that they believe they need
17 documents from the earlier time period because this was when Defendants were
18 formulating and evaluating the Zero Tolerance Separation Policy. Defendants stated
19 that they did not believe that the formulation of the policy, which they term the "how
20 and why" are relevant to this case. These are the issues teed up for the Court's
21 consideration in sections B and C above. As stated above, Plaintiffs believe that based
22 on their Complaint (¶ 74-95), this information is centrally relevant, and the District
23 Court's analysis of that policy in issuing its Preliminary Injunction, appears to confirm
24 Plaintiffs' understanding. *See* Order at 9, 41.

25 Should this Court agree that discovery into the Zero Tolerance Separation
26 Policy is relevant, then a subsidiary issue is extending the timing of discovery back to
27 January 20, 2017 as requested in Plaintiffs' Requests for Production. Even today it is
28 unclear when the Zero Tolerance Separation Policy was formulated and implemented.

1 Defendants previously submitted to Judge Sabraw in the *Ms. L.* case that the policy
2 was not in place as late as May 2018; this was false, as pointed out by Judge Sabraw,
3 Judge Kronstadt, and HHS' own Office of the Inspector General. *See Order at 9*
4 (*citing Ms. L.*, No. 18-cv-00428 (S.D. Cal.), Dkt. No. 386 at 5). The Government has
5 also, in recent weeks, admitted that a further 1,556 children beyond what it had
6 previously admitted were separated from their families as they crossed the border.¹⁴

7 The time period for the formulation and implementation of the Zero Tolerance
8 Separation Policy continues to expand, despite Defendants' claims to the contrary.
9 The Court should thus order Defendants to produce responsive documents from
10 January 20, 2017 forward, to ensure that relevant discovery is produced and to avoid
11 further litigation if and when the time period of the Zero Tolerance Separation Policy
12 expands again.

13 **2. Defendants' Argument**

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15 Plaintiffs contend that Defendants should produce responsive documents
16 starting January 20, 2017. Defendants disagree with this timeline for production of
17 documents in response to Plaintiffs' First Set of RFPs because Plaintiffs have failed to
18 demonstrate how documents dated prior to July 1, 2017 are relevant to the claims and
19 defenses in this case.

20 The relevant timeframe for the class certified by the Court begins on July 1,
21 2017, and there is no reason to extend the timeframe for discovery beyond this date.
22 Plaintiffs claim that the timing of discovery for their RFPs should go back as early as
23 January 20, 2017, and they speculate that this was the time when Defendants were
24 "formulating and evaluating" the Zero Tolerance Policy. As stated above, the creation

25 ¹⁴ See Jasmine Aguilera, "Trump Administration Has Separated 1,556 More Migrant
26 Children Than Previously Known," Time, Oct. 26, 2019, available at
<https://time.com/5710953/trump-administration-confirms-more-migrant-family-separation/>; Camilo Montoya-Galvez, "1,556 more migrant families were separated
27 under Trump than previously known," CBS News, Oct. 25, 2019, available at
<https://www.cbsnews.com/news/family-separation-1556-more-migrant-families-were-separated-under-trump-than-previously-known/>. These articles are attached as
28 Exhibits R and S to the Fee Declaration respectively.

1 and adoption of the Zero Tolerance Policy is not relevant to the claims and defenses in
2 this case, which instead center on Plaintiffs' claims of psychological trauma as a result
3 of the policy, the adequacy of mental health screening and treatment provided by the
4 government while Plaintiffs were in detention, and Defendants' duty to provide
5 mental health treatment sufficient to mitigate the harm that the application of the
6 policy allegedly caused Plaintiffs. Order at 14, 20. The timeframe for the certified
7 class relates directly to the mental and psychological harm Plaintiffs claim they
8 suffered, which was when they were separated from their children and placed in
9 detention. Again, the how and why of the Zero Tolerance Policy has no bearing on the
10 issue of whether Plaintiffs suffered mental health trauma and whether Defendants
11 were aware of the trauma and were indifferent to the duty of care owed to Plaintiffs.
12 Thus, there is no reason the time period for discovery should extend beyond the
13 timeframe of the certified class.

14 **E. Documents Produced in Other Litigation (RFP 16)**

15 **1. Plaintiffs' Argument**

16 Plaintiffs have requested documents produced related to the Zero Tolerance
17 Separation Policy produced in other litigation including in the *Ms. L* case. To the
18 extent the Court decides that documents related to the Zero Tolerance Separation
19 Policy are responsive and should be produced in this action, *supra* Section III(B), such
20 documents would be responsive here and should be produced.

21 Defendants have objected repeatedly to the burden of collecting and producing
22 documents in response to Plaintiffs' requests – no matter how targeted. With regards
23 to documents already collected, reviewed, loaded to databases, and produced to
24 opposing parties, these burden objections diminish significantly, if not completely.
25 The documents have already been collected and are in one place, having been
26 produced. All that is required is reproduction of the documents in this matter which
27 can be as simple as copying a disk.

28 Given the year that has passed since the service of the document requests, this

1 set of documents is already prepared and ready to go and can provide a jumpstart to
2 discovery.

3 Defendants' arguments regarding Protective Orders in other matters are not
4 convincing either. In the *Ms. L.* Protective Order, for example, the Order states that
5 "Nothing in this Order shall be deemed to restrict in any matter the use by any party of
6 its own documents or materials" which are the materials that Plaintiffs are requesting
7 here. Fee Decl. Ex. N (*Ms. L.* Protective Order) ¶ 32.

8 **2. Defendants' Argument**

9 Plaintiffs request discovery into documents produced in other litigation
10 involving the Zero Tolerance Policy. Defendants contend that such discovery does not
11 exist as there has not been discovery in related Zero Tolerance Policy cases and, to the
12 extent there has been discovery in those cases, it is irrelevant to this case. To the
13 extent that other litigation involving the Zero Tolerance Policy enters discovery and
14 documents are produced, Defendants contend that any request that they produce future
15 discovery is unduly burdensome and irrelevant. The Court should deny this request.

16 First, the instant litigation is the only class action, and also the only litigation
17 generally, concerning the Zero Tolerance Policy which is presently in discovery.
18 Moreover, Plaintiffs' request for discovery into the data and documents produced in
19 *Ms. L.* and other litigation involving the Zero Tolerance Policy demonstrates that they
20 are unfamiliar with the posture and proceedings in *Ms. L. v. U.S. Immigration and*
Customs Enforcement, No. 3:18-cv-00428 (S.D. Cal.) (Sabraw, J.) and other similar
21 litigation. Had Plaintiffs examined the docket in *Ms. L.*, Plaintiffs would be aware that
22 that case remains in the preliminary injunction stage and has not entered discovery,
23 and thus no class-wide discovery documents have been produced. The protective order
24 in *Ms. L.* was entered "to facilitate the exchange of documents and information" "for
25 the purpose of facilitating compliance with the Court's preliminary injunction order."
26 See *Ms. L.*, No. 3:18-cv-00428, ECF No. 92 at 2. The protective order in *Ms. L.* served
27 the limited purpose of facilitating compliance with the preliminary injunction and was

1 not related to formal discovery. Here, the parties have filed a joint rule 16(b)/26(f)
2 report, *see* ECF No. 124, and have commenced with formal discovery, unlike in *Ms.*
3 *L.* Accordingly, Plaintiffs' argument that the protective order in *Ms. L.* allows
4 Defendants to produce in this case information that was produced in *Ms. L.* is not
5 convincing. Further, Plaintiffs' request that Defendants produce any future discovery
6 in a related Zero Tolerance Policy case is unduly burdensome and Plaintiffs fail to
7 demonstrate how such future discovery is relevant to the claims and defenses in this
8 case.

9 In any event, whether or not productions of discovery material have occurred in
10 *Ms. L.*, or in any other case for that matter, is irrelevant. Plaintiffs must request
11 relevant documents, and Defendants are under a continuing obligation to respond to
12 that request by undertaking reasonable efforts to produce responsive and relevant
13 documents in proportion to the needs of the case. Fed. R. Civ. P. 26. Plaintiffs' RFP
14 16, which calls for the production of documents from *other* cases, regardless of
15 whether those documents are relevant to the claims and defenses in *this* case, is
16 plainly improper. Courts have routinely held that discovery produced in other
17 litigation is beyond permissible discovery. *King County v. Merrill Lynch & Co.*, No.
18 C10-1156-RSM, 2011 WL 3438491, at *3 (W.D. Wash. Aug. 5, 2011). As such,
19 courts consistently deny requests to produce documents produced in related
20 lawsuits—*i.e.*, they do not allow piggybacking on prior discovery. *See, e.g., id.; In re*
21 *Volkswagen “Clean Diesel” Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No.
22 2672 CRB (JSC), 2017 WL 4680242, at *1 (N.D. Cal. Oct. 18, 2017) (denying request
23 to produce prior discovery in securities class action). “This is because, without more,
24 the Court cannot ascertain whether the documents requested actually relate to
25 Plaintiffs’ claims and defenses.” *King County*, 2011 WL 3438491, at *3. For the same
26 reason, Plaintiffs should not be permitted to piggyback onto prior discovery or leech
27 from future discovery in other cases, especially when such future discovery is purely
28 speculative. As stated by the District Court for the Southern District of California,

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Asking for all documents produced in another matter is not generally proper. The propounding party cannot meet its burden to establish relevance, as the propounding party is not in a position to even know what they are actually asking for. There could be a number of reasons why documents appropriately requested and provided in another case—even if the subject matter of those cases seem to overlap—would be irrelevant or burdensome to provide in another case.

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If relevant and proportional documents exist in the custody or control of the responding party, the appropriate thing to do is to request those documents. The fact that the documents were or were not produced in other litigation is irrelevant. Moreover, compelling a responding party to do duplicate searches—one for responsive documents in their custody and control and one for all documents in their custody and control that were previously produced in other litigation—is definitionally unduly burdensome, as it would consume resources without providing any additional benefit to the propounding party.

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Ludlow v. Flowers Foods, Inc., No. 18-cv-01190-JLS-JLB, 2019 WL 6252926, at *18 (S.D. Cal. Nov. 22, 2019); *Goro v. Flowers Foods*, No. 17-cv-02580-JLS-JLB, 2019 WL 6252499, at *18 (S.D. Cal. Nov. 22, 2019).

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F. Objections Based on Existence of Zero Tolerance Separation Policy (RFPs 2, 3, 4, 8, 9, 16)

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1. Plaintiffs' Argument

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Defendants repeatedly object that the Zero Tolerance Separation Policy “does not exist” and try to cabin discovery about this policy to two different memoranda. Fee Decl. Ex. D (DOJ Defendants’ Responses to RFPs 2, 3, 4, 8, 9, 16).¹⁵ In meet and confer discussions, Defendants said that they would object to any definition broader than these two memoranda and would object to defining the Zero Tolerance Separation Policy as it is described by the Court in the Order for Preliminary Injunction. Order at 6, 7-8 (describing policy as enjoined by *Ms. L.*), 29-30 (certifying

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¹⁵ Similar arguments are made in DHS Defendants’ Responses to RFPs 2, 3, 4, 8, 9, 16 and HHS Defendants’ Responses to RFPs 3, 8, 16. Those responses are in Exhibits E and F to the Fee Declaration respectively.

1 class whose injury results from the Zero Tolerance Separation Policy).

2 Defendants' claim that the Zero Tolerance Separation Policy does not exist
3 lacks credibility. The HHS Defendants' Inspector General issued a report on the
4 policy. *See* Press Release, Health and Human Services Office of Inspector General,
5 "HHS OIG: Children Separated from Parents, Guardians Before *Ms. L.* v. ICE Court
6 Order and Some Separations Continue (Jan. 17, 2019), available at
7 <https://www.oig.hhs.gov/newsroom/news-releases/2019/uac.asp> (directly referencing
8 the zero-tolerance policy) (attached hereto as Exhibit O to the Fee Declaration). Also,
9 as noted, this Court and the *Ms. L.* Court have delved deeply into the policy.

10 Defendants' representations about the Zero Tolerance Separation Policy, when
11 it was instituted, what it encompassed, etc. have changed drastically over the course of
12 their litigation about the policy, with further evidence periodically proving that the
13 policy lasted longer and covered substantially more than Defendants have said it did.
14 *See* Order at 9 (evidence that families were being separated "pursuant to the
15 Administration's new policy" in summer 2017 in "stark contrast to Defendants'
16 representation in [the *Ms. L.*] case" that this did not occur until May of 2018) (citing to
17 *Ms. L.*). In light of this history, and the Court's much broader understanding of the
18 Zero Tolerance Policy, Plaintiffs are unwilling to limit their requests to the two
19 memoranda identified by Defendants. The *Ms. L.* Court and the Court here have
20 recognized that the policy is broader than that. *Id.* Defendants should be ordered to
21 produce all documents responsive to Plaintiffs' requests using the definition of Zero
22 Tolerance Separation Policy or "family separation policy" espoused by the Court here
23 and in the *Ms. L.* case (i.e. a policy or practice of separating parents and children at the
24 border absent a determination that the parent is unfit or presents a danger to the child.)

25 **2. Defendants' Argument**

26 Defendants accurately defined the Zero Tolerance Policy, and Plaintiffs'
27 arguments on this point are disingenuous. Plaintiffs continue to inaccurately frame the
28 nature of the policy from which their claimed mental health distress and trauma arose.

1 The policy announced was not a “Zero Tolerance Separation Policy” but rather a Zero
2 Tolerance Policy.

3 On April 6, 2018, to address an increase in unauthorized individuals crossing
4 the Southwest border into the United States, former Attorney General Sessions issued
5 a “Memorandum for Federal Prosecutors along the Southwest Border.” U.S.
6 Department of Justice, News Release: Attorney General Announces Zero-Tolerance
7 Policy for Criminal Illegal Entry (April 6, 2018), DOJ 18-417, 2018 WL 1666622
8 <https://www.justice.gov/opa/press-release/file/1049751/download>.

9 This memorandum “direct[ed] each United States Attorney’s Office along the
10 Southwest Border to the extent practicable, and in consultation with DHS to adopt
11 immediately a *zero-tolerance policy* for all offenses referred for prosecution under
12 section 1325(a).” *Id.* (emphasis added); *see* Fee Decl. Ex. O (referencing the “zero-
13 tolerance policy”). The “Zero Tolerance Policy” exists and is established from the
14 directly quoted text of the operative memorandum. This was a law enforcement policy
15 focused on the prosecution of offenses under a particular statute and that resulted in
16 the separation of parents from their children when they were prosecuted under the
17 relevant statute. Plaintiffs’ reference to HHS Defendants’ Inspector General issuing a
18 report on the policy is a red herring as that report does not demonstrate the existence
19 of a policy to separate families. *See* Fee Decl. Ex. O.

20 In their objections, Defendants construed Plaintiffs’ use of the term “Zero
21 Tolerance Separation Policy” to mean the Zero Tolerance Policy as set forth by the
22 former Attorney General in the memorandum noted above. *See, e.g.,* DOJ Defendants’
23 response to RFP No. 2. (“Defendants define the Zero Tolerance Policy as a policy that
24 directed each U.S. Attorney’s Office along the Southwest Border to adopt a policy to
25 prosecute all DHS referrals of section 1325(a) violations, to the extent practicable.”).
26 Thus, for purposes of Plaintiffs’ RFPs, Defendants accurately defined the policy at
27
28

1 issue.¹⁶ Defendants have never denied the existence of the memorandum or the “Zero
2 Tolerance Policy.” To the extent that Plaintiffs’ references to a “Zero Tolerance
3 Separation Policy,” a “Zero Tolerance Family Separation Policy,” or a “Family
4 Separation Policy” refer to policies *other than* the Zero Tolerance Policy, Defendants
5 object to producing documents relating to these policies because they do not exist.
6 Defendants cannot produce that which does not exist. *University of Kansas v. Sinks*,
7 No. 06-2341-KHV-GLR, 2007 WL 869629, at *3 (D. Kan. Mar. 22, 2007) (“The
8 Court cannot compel a party to produce documents based solely on opposing
9 speculation and belief that responsive documents exist and that the producing party is
10 withholding them.”).

11 While Defendants maintain their objections on the basis of relevance, and the
12 definition of the Zero Tolerance Policy at issue in this case, Defendants agreed to
13 produce, as relevant here, documents in response to RFP Nos. 3 and 8. *See HHS*
14 Defendants’ Response to RFP Nos. 3 and 8; DHS Defendants’ Response to RFP No.
15 8. Defendants’ responses to those RFPs will be limited to Defendants’ accurate
16 definition of the Zero Tolerance Policy.

17 **G. Production of Health Information (RFPs 12, 13, 14)**

18 **1. Plaintiffs’ Argument**

19 Defendants objected to the burden of producing mental health records. Instead
20 they proposed, during meet and confer, to produce responsive records for a
21 statistically significant sample of class members and their children including named
22 plaintiffs, the detained subclass, and a randomly selected sample of the released
23 subclass. *See* Fee Decl. Ex. P (correspondence detailing sampling proposal).

24 Defendants’ proposal is acceptable with one exception: Plaintiffs need
25 Defendants to complete their production of responsive records for this sample within
26 four months. This is so that should Plaintiffs need records for other class members

27
28 ¹⁶ The Court did, however, adopt Plaintiffs’ renaming of the policy. *See generally*
Order (referencing a “family separation policy” throughout the decision).

1 there would still be time before the discovery cutoff to produce those records and
2 provide them to Plaintiffs' experts in order to form the necessary opinions for trial.

3 Plaintiffs have significantly accommodated Defendants by agreeing to take a
4 sample of documents rather than the full responsive set. More may ultimately be
5 needed, and Plaintiffs cannot afford to have the clock run out before they are able to
6 evaluate whether more is needed.

7 **2. Defendants' Argument**

8 Plaintiffs' improperly include in their motion to compel an argument
9 concerning Defendants' proffer with respect to the production of medical records, and
10 in any case, their arguments as to the production of medical records have no merit.

11 First, Plaintiffs' Rule 37-1 letter does not mention medical records or the
12 timeline for producing medical records whatsoever, so Plaintiffs improperly raise this
13 issue in their motion to compel. *See* Fee Decl. Ex. L. The Local Rules of the District
14 Court for the Central District of California provide,

15 Before filing any motion relating to discovery under F.Rs.Civ.P. 26-37,
16 counsel for the parties must confer in a good-faith effort to eliminate
17 the necessity for hearing the motion or to eliminate as many of the
18 disputes as possible.... [C]ounsel for the opposing party must confer
19 with counsel for the moving party within ten days after the moving
20 party serves a letter requesting such conference. The moving party's
21 letter must identify each issue and/or discovery request in dispute, state
22 briefly as to each such issue/request the moving party's position (and
provide any legal authority the moving party believes is dispositive of
the dispute as to that issue/request), and specify the terms of the
discovery order to be sought.

23 C.D. Cal. L.R. Civ. P. 37-1. This Court has explicitly noted that "[a] moving party's
24 failure to certify or show compliance with Rule 37(a)(1) can result in the entire motion
25 to compel being denied without prejudice." *Soc. Sampling v. Dennis Garberg &*
26 *Assocs.*, No. SACV 13-00856 CJC (ANx), 2014 WL 12561595, at *1 (C.D. Cal. Aug.
27 21, 2014). Oral discussion of a topic during a meet and confer does not cure Plaintiffs'

1 failure to identify this specific issue with the production of medical records in a Local
2 Rule 37-1 letter that identifies case law supporting their demand for production of
3 medical records on an expedited basis.

4
5 [F]ailure to comply with the meet and confer requirements of Local Rule
6 37—which require the moving party to initiate the process by sending a
7 *letter* to opposing counsel identifying the matters in dispute and the law
8 supporting the party’s position, followed by a conference of counsel—is
enough, by itself, to warrant dismissal of the [m]otion.

9 *Darbeevision, Inc. v. C&A Mktg.*, No. CV 18-0725 AG (SSx), 2019 WL 2902697, at
10 *5 (C.D. Cal. Jan. 28, 2019). “The purposes underlying Local Rule 37-1’s letter
11 requirement are important. Wisdom and experience teach that the first step in reaching
12 a reasonable compromise to resolve a discovery dispute is defining clearly the scope
13 and nature of the dispute.” *Castillo v. Bank of America N.A.*, 2018 WL 6074580 (C.D.
14 Cal. Sept. 28, 2018).

15 The parties have met and conferred on the medical records issue, and the last
16 correspondence between the parties regarding this issue was on December 18, 2019.
17 See Fee Decl. Ex. P. Plaintiffs did not respond to that email, nor did they address that
18 issue in the parties’ subsequent telephonic meet and confer regarding the outstanding
19 discovery issues. Plaintiffs did not inform Defendants that they intended to raise this
20 issue as part of this motion to compel. See Fee Decl. Ex. I. Until served with
21 Plaintiffs’ portion of this joint stipulation, Defendants were unaware that Plaintiffs
22 rejected Defendants’ last proffer. Plaintiffs should not be rewarded for their failure to
23 write a meet and confer letter addressing the medical records issue. *Bragel Int’l, Inc.*
24 v. *Kohl’s Dep’t Stores*, No. CV 17-7414 RGK (SSx), 2018 WL 7890682, at *4 (C.D.
25 Cal. Nov. 14, 2018) (“Bragel represents that it was not informed of the exact
26 discovery requests at issue and CGP’s contentions as to the inadequacy of Bragel’s
27 responses until it received the proposed Joint Stipulation. That basic information
28

1 should have been included in CGP's opening letter. Bragel was not required to guess
2 what CGP was seeking."); *So v. Land Base, LLC*, No. CV 08-3336-DDP (AGRx),
3 2010 WL 11515456, at *2 (C.D. Cal. June 9, 2010) (dismissing a portion of a motion
4 to compel where a specific issue was not identified in Local Rule 37-1
5 correspondence).

6 Second, Plaintiffs now respond to Defendants' proffer by stating "Defendants'
7 proposal [to produce responsive records for a statistically significant sample of class
8 members and their children] is acceptable with one exception: Plaintiffs need
9 Defendants to complete their production of responsive records for this sample within
10 four months." This response renders the use of a statistically significant sample size
11 illusory if Plaintiffs intent is to request more medical records beyond the statistical
12 sample. Defendants agreed

13 to produce on a rolling basis 1) all of named Plaintiffs' and their children's
14 responsive medical records, 2) all of the detained subclass members' and
15 their children's responsive medical records, and 3) all of the responsive
16 medical records for a statistically significant sample of members of the
released subclass and their children.

17
18 Fee Decl. Ex. P at 1. Defendants further proposed that a statistically significant sample
19 of records in this case would be the records of 350 class members, plus their
20 children's medical records, which in total is at least 700 medical records. *Id.* As
21 explained in Defendants' proffer to Plaintiffs, this calculation was based on the
22 approximate size of the class "using the standard confidence value of a 95%
23 confidence level and a 5% confidence interval." *Id.* Defendants agreed to produce the
24 records on a rolling basis beginning within one month from the date a protective order
25 is in place and the statistically significant sample list is finalized. *Id.* Defendants
26 included in this proffer their position on Plaintiffs' request that the records be
27 produced in four months stating that this production
28

1 is extraordinarily burdensome for Defendants. For example, the process
2 for collection of medical records potentially involves multiple facilities
3 across the class, and for each class member may involve the collection
4 from multiple facilities depending upon the facility or the number of
5 facilities at which the class member has been detained. Similarly, the
6 medical records of class members' children involves the same burdens.

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10 *Id.* Accordingly, Plaintiffs have not adequately responded to Defendants' proffer and
11 burden arguments in response to their request for a four-month production timeline,
12 and this Court should deny their request.

13 Finally, even if the Court entertains Plaintiffs' arguments in this respect, and
14 excuses Plaintiffs' failure to comply with the letter and meet and confer requirements
15 of Local Rule 37-1, Plaintiffs' arguments are couched in speculative terms, and their
16 motion to compel medical records on an expedited basis is premature. Plaintiffs state
17 only a hypothetical need for production of large volumes of medical records on a
18 shortened timeline, while at the same time, request that the Court impose a
19 tremendous burden on Defendants. *See Muhammad*, 2019 WL 6315536, at *8–9
20 ("even plainly relevant discovery [] is not limitless.").

21 The agency declarations submitted with this Joint Stipulation demonstrate the
22 extraordinary burden imposed by a four-month production timeline. Plaintiffs do not
23 justify the imposition of this burden by stating that the shortened window might serve
24 a hypothetical need. To impose this timeline would be burdensome because, for DHS,
25 there are two processes for collecting and producing medical records from ICE
26 detention facilities depending on the type of facility and each process requires a
27 significant amount of agency resources to implement with just two Immigration
28 Health Service Corps ("IHSC") contractors available to complete the task for this
 case. *See Vick Decl. Ex. 7* (DHS Defendants' Declaration of Barbara Alley) ¶¶ 7-8.
 IHSC will have to research the detention history of each detainee and determine how
 many facilities at which the detainee was housed, and therefore, how many medical

1 records will be produced per detainee. *Id.* at ¶ 6. Thus, IHSC/DHS may have to
2 produce between 350 and 1,050 (or more) depending on whether the detainee was
3 housed at one, two, or more than three facilities. *Id.* And for non-IHSC facilities,
4 IHSC does not have direct access to the medical records and it can take as long as 16
5 months to produce 200 medical records from non-IHSC facilities. *Id.* at ¶¶ 9-13. Thus,
6 DHS estimates that it would need at a minimum 10 months to produce the records in
7 this case. *Id.* at ¶ 14.

8 For HHS, their operators will have to separately download and analyze each
9 document in a child's case file, which "can be extremely voluminous depending on
10 the child's length of care, number of placements, and case complexity . . . a single
11 child's case file could reach well over 1,000 pages for each facility in which the child
12 resided. So, if a child resided in 2 facilities, it is possible for the child's complete file
13 to be over 2,000 pages." *See Vick Decl. Ex. 8 (HHS Defendants' Declaration of Trina*
14 *L. Robinson) ¶¶ 20-21.* Also, the ORR Case File Team has just three full-time
15 employees who will likely need to review medical forms individually as the primary
16 medical document describing the medical conditions and treatment for children is
17 hand written and cannot be electronically searched. *Id.* at ¶ 22-23. Thus, it can take
18 several weeks to process one case file request for a single child. *Id.* at ¶ 24. To
19 produce the amount of case files for this case, an estimated 441 case files for the
20 children of the statistically significant sample of class members, "HHS would have to
21 deploy ORR staff to respond to this request, resulting in considerable hardship to
22 ORR's core functions and its ability to care for the unaccompanied alien children
23 presently in its custody." *Id.* at ¶ 25. HHS estimates that this process will require more
24 than eight months. *Id.* at ¶ 26.

25 Discovery closes on October 5, 2020. *See Fee Decl. Ex. A.* As a result of the
26 extraordinary burden, adequately demonstrated above, of producing the agreed-upon
27 amount of case files, and barring significant delays in obtaining medical records from
28 the facilities, Defendants intend to produce medical records on a rolling basis in

1 response to Plaintiffs' RFPs and expect to complete production by the close of
2 discovery. *See Vick Decl. Ex. 7 at ¶ 14.*

3 **H. Production of Information Related to Inmate Health Message Slip
(RFP No. 15)**

4 **1. Plaintiffs' Argument**

5 DOJ Defendants, DHS Defendants, and HHS Defendants have all objected to
6 producing information related to this form, pointing to other agencies as the correct
7 source for this information. Fee Decl. Exs. D, E, F. This is despite the fact that
8 Defendants have submitted this form as evidence of the care allegedly provided to
9 Plaintiffs. *See Order at 12, 36; Fee Decl. Ex. Q (Defendants' Notice of Lodging
Inmate Health Slip, ECF Dkt. No. 141).* Having utilized this form affirmatively in this
10 action, Defendants cannot now refuse to produce information about it. Defendants are
11 also in a much better position, having identified the form and introduced it into this
12 action, to know where responsive information is held and to produce that information.
13 DOJ represents all three agencies here, and DOJ attorneys introduced this form in
14 support of their arguments. DOJ should not be surprised that Plaintiffs now seek
15 discovery on the form they introduced, and they should be ordered to locate and
16 produce responsive documents.

17 **2. Defendants' Argument**

18 Plaintiffs argue that Defendants "refuse to produce information" about the
19 Inmate Health Message Slip ("the Slip"). Plaintiffs are wrong. Defendants' objections
20 to RFP No. 15 relating to the Slip are proper because no Defendant has in its
21 possession, custody, or control any other documents relating to the Slip. Of course,
22 Defendants are cognizant of their duty pursuant to Federal Rule 26(e) to supplement
23 and correct discovery responses if they learn that those responses are somehow
24 incorrect or incomplete. Accordingly, Defendants do not have any responsive
25 documents to this request, but if responsive material is later discovered, Defendants
26 will produce that material.

1 At the hearing on September 20, 2018, on Plaintiffs' Motions for Preliminary
2 Injunction and Class Certification, an Inmate Health Message Slip was offered to the
3 Court for the limited purpose of showing an example of a type of health care form
4 provided to detainees at a particular facility. *See Vick Decl. Ex. 5* (portion of hearing
5 transcript). Defendants understand that this document may have been distributed at the
6 James A. Musick Detention Facility, which no longer contracts with Defendant DHS,
7 when Named Plaintiff Ms. J.P. was detained there. *See Vick Decl. Ex. 6*. At the time
8 that this document was presented to the Court and at the present time, Defendants
9 cannot ascertain whether this document was widely distributed or the degree to which
10 this form saw use. *Vick Decl. Ex. 5* at 70-71.

11 Regardless, a review of the Inmate Health Message Slip reveals that the form
12 was formulated, produced, and implemented by the California state or local
13 government in Orange County, California. *See Fee Decl. Ex. Q*. As a result,
14 Defendants do not possess any information related to the Slip other than a copy of the
15 Slip itself. Any request for information relating to the considerations leading up to the
16 issuance of that form should be directed to Orange County.

17 Finally, Defendants note Plaintiffs misunderstand the nature of DOJ, DHS, and
18 HHS Defendants' objections based on "possession, custody, or control." In litigation,
19 "Government agencies do not merge into a monolith[.]" *Hughes*, 701 F.2d at 58.
20 Knowledge, notice, custody, control, and possession is not imputed between
21 government entities, or for the purposes of discovery, by other government entities.
22 For example, Defendant DHS can make no statement as to whether Defendant HHS
23 has, or does not have, requested documents within its possession, custody, or control
24 and vice-versa. When the objections are properly read, the responses make clear that
25 no Defendant "point[s]" to another co-Defendant being a custodian of, controlling, or
26 possessing responsive information. However, because knowledge of custody, control,
27 and possession is not imputed between government entities, it is equally so that no co-
28 Defendant can affirmatively rule out another co-Defendant as a source of information.

1 Taken together, the responses make clear that all Defendants deny having possession,
2 custody, or control of the requested documents. *See 7-UP Bottling Co. v. Archer*
3 *Daniels Midland Co. (In re Citric Acid Litig.)*, 191 F.3d 1090, 1107 (9th Cir. 1999)
4 (providing that the standard in the Ninth Circuit for possession, custody, or control is
5 the legal right to obtain documents). Nonetheless, if a Defendant locates a document
6 relating to the Inmate Health Message Slip, it will be produced in accordance with
7 Fed. R. Civ. P. 26(e) and 34. *See Kinetic Concepts, Inc. v. Convatec Inc.*, 268 F.R.D.
8 226, 252 (M.D.N.C. 2010) (“[E]ven an informed suspicion that additional non-
9 privileged documents exist ... cannot alone support an order compelling production of
10 documents.”).

11

12

Date: January 15, 2020

SIDLEY AUSTIN LLP

13

14

By: /s/ Amy P. Lally

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Amy P. Lally

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Ellyce R. Cooper

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Attorneys for Plaintiffs

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Date: January 15, 2020

UNITED STATE DEPARTMENT OF
JUSTICE, OFFICE OF
IMMIGRATION LITIGATION

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By: /s/ Lindsay M. Vick

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Nicole N. Murley

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Lindsay M. Vick

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Attorneys for Defendants

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FILER'S ATTESTATION

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28

Pursuant to Local Rule 5-4.3.4(a)(2) of the Central District of California, I attest

1 that I have concurrence in the filing of this document.

2

3 By: /s/ Amy P. Lally

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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1999 Avenue of the Stars, 17th Floor, Los Angeles, California 90067.

On January 15, 2019, I served the foregoing document(s) described as **JOINT STIPULATION PURSUANT TO C.D. CAL. LOCAL RULE 37-2** on all interested parties in this action by the method described below:

I electronically filed the foregoing with the Clerk of District Court using its CM/ECF system, which electronically provides notice.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Amy P. Lally
Amy P. Lally
Attorney for Plaintiffs